

KF

141

43

v.76



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
IRVINE

GIFT OF

J. A. C. Grant





Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXVI.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1901.

Entered according to Act of Congress in the year 1901, by the
BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

SAN FRANCISCO:
THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOL. LXXVI

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ILLINOIS REPORTS Vol. 185.	17-63
NEBRASKA REPORTS Vol. 58.	64-138
NEW HAMPSHIRE REPORTS . . . Vol. 69.	139-210
NEW JERSEY LAW REPORTS . . . Vol. 63.	211-237
NEW YORK REPORTS Vols. 161, 162.	238-353
OHIO STATE REPORTS Vol. 61.	354-449
OREGON REPORTS Vol. 35.	450-523
SOUTH CAROLINA REPORTS . . . Vols. 56, 57.	524-584
SOUTH DAKOTA REPORTS Vol. 12.	585-634
TENNESSEE REPORTS Vol. 103.	635-707
TEXAS CRIMINAL REPORTS . . . Vol. 40.	708-745
VERMONT REPORTS Vol. 71.	746-790
WEST VIRGINIA REPORTS Vol. 46.	791-847
WISCONSIN REPORTS Vols. 104, 105.	848-956

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**; (106, 107, 108) **54**; (109, 110) **55**; (111) **56**; (112) **57**; (113) **59**; (114) **62**; (115, 116) **67**; (118, 119) **72**; (120) **74**.

ARKANSAS. — (48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**; (61, 62) **54**; (63) **58**; (64) **62**; (65) **67**; (66) **74**.

CALIFORNIA. — (72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**; (113) **54**; (114) **55**; (115) **56**; (116) **58**; (117) **59**; (118) **62**; (119) **63**; (120) **65**; (121) **66**; (122) **68**; (123) **69**; (124) **71**; (125) **73**.

COLORADO. — (10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**; (22) **55**; (23) **58**; (24) **65**; (25) **71**.

CONNECTICUT. — (54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**; (68) **57**; (69) **61**; (70) **66**; (71) **71**.

DELAWARE. — (5 *Houst.*) **1**; (6 *Houst.*) **22**; (7 *Houst.*) **40**; (9 *Houst.*) **43**; (1 *Marv.*) **65**; (2 *Marv.*) **69**; (1 *Pennewill*) **73**.

FLORIDA. — (22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (36) **51**; (37) **53**; (38) **56**; (39) **63**; (40) **74**.

GEORGIA. — (76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**; (91, 92, 93) **44**; (94) **47**; (95, 96) **51**; (97) **54**; (98) **58**; (99) **59**; (100) **62**; (101) **65**; (102) **66**; (103) **68**; (104) **69**; (105) **70**; (106) **71**; (107) **73**; (108) **75**.

IDAHO. — (2) **35**.

ILLINOIS. — (121) **2**; (122) **3**; (123) **5**; (124) **7**; (125) **8**; (126) **9**; (127) **11**; (128) **15**; (129) **16**; (130) **17**; (131) **19**; (132) **22**; (133, 134) **23**; (135) **25**; (136) **29**; (137) **31**; (138, 139) **32**; (140, 141) **33**; (142) **34**; (143, 144, 145) **36**; (146, 147) **37**; (148) **39**; (149, 150) **41**; (151) **42**; (152) **43**; (154) **45**; (153, 155) **46**; (156) **47**; (157) **48**; (158) **49**; (159) **50**; (160, 161) **52**; (162) **53**; (163) **54**; (164, 165) **56**; (166) **57**; (167) **59**; (168, 169) **61**; (170) **62**; (171) **63**; (172, 173) **64**; (174) **66**; (175) **67**; (176) **68**; (177, 178) **69**; (179) **70**; (180, 181) **72**; (182) **74**; (183, 184) **75**; (185) **76**.

INDIANA. — (112) **2**; (113) **3**; (114) **5**; (115) **7**; (116) **9**; (117, 118) **10**; (119) **12**; (120, 121) **16**; (122) **17**; (123) **18**; (124) **19**; (125) **21**; (126, 127) **22**; (128) **25**; (129) **28**; (130) **30**; (131) **31**; (132) **32**; (133) **36**; (134) **39**; (135) **41**; (136) **43**; (137) **45**; (138) **46**; (139) **47**; (140) **49**; (1, 2, 3 Ind. App.; 141) **50**; (4, 5, 6 Ind. App.; 142) **51**; (7, 8, Ind. App.; 143) **52**; (9, 10 Ind. App.) **53**; (11 Ind. App.) **54**; (13 Ind. App.; 144) **55**; (14 Ind. App.) **56**; (15 Ind. App.; 145) **57**; (146) **58**; (16 Ind. App.) **59**; (17 Ind. App.) **60**; (147, 148) **62**; (18 Ind. App.; 149) **63**; (150, 19 Ind. App.) **65**; (20 Ind. App.) **67**; (151) **68**; (21 Ind. App.) **69**; (152) **71**; (22 Ind. App.) **72**; (153) **74**.

IOWA. — (72) **2**; (73) **5**; (74) **7**; (75) **9**; (76, 77) **14**; (78) **16**; (79) **18**; (80) **20**; (81) **25**; (82) **31**; (83) **32**; (84) **35**; (85) **39**; (86) **41**; (87) **43**; (88) **45**; (89, 90), **48**; (91) **51**; (92) **54**; (93) **57**; (94, 95) **58**; (96, 97) **59**; (98) **60**; (99) **61**; (100) **62**; (101, 102) **63**; (103) **64**; (104) **65**; (105) **67**; (106) **68**; (107) **70**; (108) **75**.

KANSAS. — (37) **1**; (38) **5**; (39) **7**; (40) **10**; (41) **13**; (42) **16**; (43) **19**; (44) **21**; (45) **23**; (46) **26**; (47) **27**; (48) **30**; (49) **33**; (50) **34**; (51) **37**; (52) **39**; (53) **42**; (54) **45**; (55) **49**; (56) **54**; (57) **57**; (58) **62**; (59) **68**; (60) **72**.

KENTUCKY. — (83, 84) **4**; (85) **7**; (86) **9**; (87) **12**; (88) **21**; (89) **25**; (90) **29**; (91) **34**; (92) **36**; (93) **40**; (94) **42**; (95) **44**; (96) **49**; (97) **53**; (98) **56**; (99) **59**; (100) **66**; (101) **72**.

LOUISIANA. — (39 La. Ann.) **4**; (40 La. Ann.) **8**; (41 La. Ann.) **17**; (42 La. Ann.) **21**; (43 La. Ann.) **26**; (44 La. Ann.) **32**; (45 La. Ann.) **40**; (46, 47 La. Ann.) **49**; (48 La. Ann.) **55**; (49 La. Ann.) **62**; (50 La. Ann.) **69**; (51 La. Ann.) **72**.

MAINE. — (79) **1**; (80) **6**; (81) **10**; (82) **17**; (83) **23**; (84) **30**; (85) **35**; (86) **41**; (87) **47**; (88) **51**; (89) **56**; (90) **60**; (91) **64**; (92) **69**; (93) **74**.

MARYLAND. — (67) **1**; (68) **6**; (69) **9**; (70) **14**; (71) **17**; (72) **20**; (73) **25**; (74) **28**; (75) **32**; (76) **35**; (77) **39**; (78) **44**; (80) **45**; (79) **47**; (81) **48**; (82) **51**; (83) **55**; (84) **57**; (85) **60**; (86) **63**; (87) **67**; (88) **71**; (89) **73**.

MASSACHUSETTS. — (145) **1**; (146) **4**; (147) **9**; (148) **12**; (149) **14**; (150) **15**; (151) **21**; (152) **23**; (153) **25**; (154) **26**; (155) **31**; (156) **32**; (157) **34**; (158) **35**; (159) **38**; (160) **39**; (161) **42**; (162) **44**; (163) **47**; (164) **49**; (165) **52**; (166) **55**; (167) **57**; (168) **60**; (169) **61**; (170) **64**; (171) **68**; (172) **70**; (173) **73**; (174) **75**.

MICHIGAN. — (60, 61) **1**; (62) **4**; (63) **6**; (64, 65) **8**; (66, 67) **11**; (68, 69, 75) **13**; (70) **14**; (71, 76) **15**; (72, 73, 74) **16**; (77, 78) **18**; (79) **19**; (80) **20**; (81, 82, 83) **21**; (84) **22**; (85, 86, 87) **24**; (88) **26**; (89) **28**; (90, 91) **30**; (92) **31**; (93) **32**; (94) **34**; (95, 96) **35**; (97) **37**; (98) **39**; (99) **41**; (100) **43**;

(101) **45**; (102) **47**; (103) **50**; (104) **53**; (105) **55**; (106) **58**; (107) **61**;
(108) **62**; (109) **63**; (110) **64**; (111) **66**; (112, 113) **67**; (114) **68**; (115)
69; (116, 117) **72**; (118) **74**; (119) **75**.

MINNESOTA. — (36) **1**; (37) **5**; (38) **8**; (39, 40) **12**; (41) **16**; (42) **18**; (43) **19**;
(44) **20**; (45) **22**; (46) **24**; (47) **28**; (48) **31**; (49) **32**; (50) **36**; (51, 52)
38; (53) **39**; (54) **40**; (55) **43**; (56) **45**; (57) **47**; (58) **49**; (59) **50**; (60) **51**;
(61) **52**; (62) **54**; (63) **56**; (64) **58**; (65) **60**; (66) **61**; (67, 68) **64**; (69)
65; (70) **68**; (71) **70**; (72) **71**; (73) **72**; (74) **73**; (75) **74**.

MISSISSIPPI. — (65) **7**; (66) **14**; (67) **19**; (68) **24**; (69) **30**; (70) **35**; (71) **42**;
(72) **48**; (73) **55**; (74) **60**; (75) **65**; (76) **71**.

MISSOURI. — (92) **1**; (93) **3**; (94) **4**; (95) **6**; (96) **9**; (97) **10**; (98) **14**; (99) **17**;
(100) **18**; (101) **20**; (102) **22**; (103) **23**; (104, 105) **24**; (106) **27**; (107) **28**;
(108, 109) **32**; (110, 111) **33**; (112) **34**; (113, 114) **35**; (115) **37**; (116, 117)
38; (118) **40**; (119, 120) **41**; (121) **42**; (122) **43**; (123) **45**; (124, 125) **46**;
(126) **47**; (127) **48**; (128) **49**; (129) **50**; (130) **51**; (131) **52**; (132) **53**;
(133) **54**; (134) **56**; (135, 136) **58**; (137) **59**; (138) **60**; (139) **61**; (140)
62; (141, 142) **64**; (143) **65**; (144) **66**; (145) **68**; (146) **69**; (147, 148) **71**;
(149, 150) **73**; (151) **74**; (152) **75**.

MONTANA. — (9) **18**; (10) **24**; (11) **28**; (12) **33**; (13) **40**; (14) **43**; (15) **48**;
(16) **50**; (17) **52**; (18) **56**; (19) **61**; (20) **63**; (21) **69**; (22) **74**; (23) **75**.

NEBRASKA. — (22) **3**; (23, 24) **8**; (25) **13**; (26) **18**; (27) **20**; (28, 29) **26**; (30)
27; (31) **28**; (32, 33) **29**; (34) **33**; (35) **37**; (36) **38**; (37) **40**; (38) **41**;
(39, 40) **42**; (41) **43**; (42, 43) **47**; (44) **48**; (45, 46) **50**; (47) **53**; (47, 48)
58; (49) **59**; (50) **61**; (51, 52) **66**; (53) **68**; (54) **69**; (55) **70**; (56) **71**
(57) **73**; (58) **76**.

NEVADA. — (19) **3**; (20) **19**; (21) **37**; (22) **58**; (23) **62**.

NEW HAMPSHIRE. — (64) **10**; (62) **13**; (65) **23**; (66) **49**; (67) **68**; (68) **73**;
(69) **76**.

NEW JERSEY. — (43 N. J. Eq.) **3**; (44 N. J. Eq.) **6**; (50 N. J. L.) **7**; (51
N. J. L.; 45 N. J. Eq.) **14**; (46 N. J. Eq.; 52 N. J. L.) **19**; (47 N. J.
Eq.) **24**; (53 N. J. L.) **26**; (48 N. J. Eq.) **27**; (49 N. J. Eq.) **31**; (54
N. J. L.) **33**; (50 N. J. Eq.) **35**; (55 N. J. L.) **39**; (51 N. J. Eq.) **40**; (56
N. J. L.) **44**; (52 N. J. Eq.) **46**; (57 N. J. L.; 53 N. J. Eq.) **51**; (54 N. J.
Eq.; 58 N. J. L.) **55**; (59 N. J. L.) **59**; (55 N. J. Eq.) **62**; (60 N. J. L.)
64; (56 N. J. Eq.) **67**; (61 N. J. L.) **68**; (62 N. J. L.) **72**; (57 N. J. Eq.)
73; (63 N. J. L.) **76**.

NEW YORK. — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**; (112) **8**; (113) **10**;
(114) **11**; (115) **12**; (116, 117) **15**; (118, 119) **16**; (120) **17**; (121) **18**; (122)
19; (123) **20**; (124, 125) **21**; (126) **22**; (127) **24**; (128, 129) **26**; (130,
131) **27**; (132, 133) **28**; (134) **30**; (135) **31**; (136) **32**; (137) **33**; (138) **34**;
(139) **36**; (140) **37**; (141) **38**; (142) **40**; (143) **42**; (144) **43**; (145) **45**;
(146) **48**; (147) **49**; (148) **51**; (149) **52**; (150) **55**; (151) **56**; (152) **57**;
(153) **60**; (154) **61**; (155) **63**; (156) **66**; (157) **68**; (158, 159) **70**; (160)
73; (161, 162) **76**.

NORTH CAROLINA. — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104)
17; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**;
(112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**; (118) **54**;
(119) **56**; (120) **58**; (121) **61**; (122) **65**; (123) **68**; (124) **70**; (125) **74**

NORTH DAKOTA. — (1) **26**; (2) **33**; (3) **44**; (4) **50**; (5) **57**; (6, 7) **66**; (8) **73**.

OHIO. — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**; (61 Ohio St.) **76**.

OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa. St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**.

SOUTH DAKOTA. — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**.

TEXAS. — (68) **2**; (69, 24 Tex. App.) **5**; (70, 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77, 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**.

UTAH. — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**.

WYOMING. — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**.

AMERICAN STATE REPORTS.

VOL. LXXVI.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Agen v. Metropolitan Life Ins. Co.	<i>Suicide of Insured.</i>	105 Wis. 217....	905
Airhart v. State.....	<i>Self-Defense</i>	{ 40 Tex. Cr. } Rep. 470	{ 736
Altman v. School District.....	<i>Judgment.</i>	35 Or. 85.....	468
Andrews v. Sargent.....	<i>Executory Bequest.</i> ..	71 Vt. 257.....	769
Arthur v. Palatine Ins. Co.....	<i>Fire Insurance</i>	35 Or. 27.....	450
Bachelor v. Korb.....	<i>Guardian's Sale</i>	58 Neb. 122....	70
Biteinan v. Edgerly.....	<i>Exemptions.</i>	69 N. H. 244...	162
Beck v. Pennsylvania R. R. Co....	<i>Release of Damages.</i>	63 N. J. L. 232.	211
Beck v. Thompson.....	<i>Notice of Appeal</i>	35 Or. 182.....	471
Berger v. Berger.....	<i>Vendor's Lien</i>	104 Wis. 282....	877
Best Brewing Co. v. Klassen.....	<i>Corporations</i>	185 Ill. 37.....	26
Boutwell v. Marr.....	<i>Boycott</i>	71 Vt. 1.....	746
Boyer v. East.....	<i>Guardians</i>	161 N. Y. 580...	290
Bradshaw v. Jones.....	<i>Seduction</i>	103 Tenn. 331...	655
Buch v. Amory Mfg. Co.....	<i>Infant Trespassers</i> ..	69 N. H. 257...	163
Carney v. New York Life Ins. Co..	<i>Life Contract</i>	162 N. Y. 453...	347
Chadron Loan etc. Assn. v. Smith.	<i>Homestead</i>	58 Neb. 469...	108
Chattanooga Electric Ry. Co. v. } Mingle	<i>Electric Wires</i>	103 Tenn. 667...	703
Churchill v. White.....	<i>Infants</i>	58 Neb. 22.....	64
Cincinnati Daily Tribune Co. v. } Bruck	<i>Malicious Prosecution</i>	61 Ohio St. 489.	433
Clark v. Parsons.....	<i>Limitation of Actions</i>	69 N. H. 147...	157
Connecticut etc. Ins. Co. v. West- } erhoff	<i>Mortgages</i>	58 Neb. 379...	101
Corning v. Records.....	<i>Sale—Attachment.</i> ..	69 N. H. 390...	178
Covington etc. Bridge Co. v. } Steinbrock	<i>Independent Con- tractor.</i>	{ 61 Ohio St. 215. }	375
Cowdery v. Hahn.....	<i>Release of Surety</i> ...	105 Wis. 455....	923
Crim v. England.....	<i>Exrs. and Admrs.</i> ..	46 W. Va. 480..	826
Crippen v. Loughton.....	<i>Stockholders</i>	69 N. H. 540...	192

NAME.	SUBJECT.	REPORT.	PAGE.
Dillman v. Carlin.....	<i>Checks</i>	105 Wis. 14.....	902
Dow v. Electric Co.....	<i>High-water Mark</i> ...	69 N. H. 498 ...	189
Dow v. Taylor.....	<i>Trustee Process</i>	71 Vt. 337.....	775
Dow v. Winnepesaukee Gas etc. Co.,	<i>Defective Gaspipe</i> ...	69 N. H. 312....	173
Eldredge v. Palmer.....	<i>Insanity—Deeds</i>	185 Ill. 618.....	59
Elvins v. Delaware etc. Tel. Co....	<i>Mortgages</i>	63 N. J. L. 243..	217
Enterprise Ditch Co. v. Moffitt....	<i>Stock Assessments</i> ...	58 Neb. 642....	122
Ex parte Battis.....	<i>Mun. Ordinance</i>	{ 40 Tex. Cr. } Rep. 112	708
Ex parte Warfield.....	<i>Injunctions</i>	{ 40 Tex. Cr. } Rep. 413	724
Ferry v. Miltimore etc. Co.....	<i>Foreign Judgment</i> ...	71 Vt. 457.	787
Finch v. Park.....	<i>Assumpsit</i>	12 S. Dak. 63..	588
First Nat. Bank of Rapid City v. McGure.....	{ <i>Judges</i>	12 S. Dak. 226..	598
Flynn v. Baisley.....	<i>Emancipation</i>	35 Or. 268.....	495
Fraternal Mystic Circle v. State...	<i>Mandamus</i>	61 Ohio St. 628..	446
Friel v. Plumer.....	<i>Attachment</i>	69 N. H. 498...	190
Gagnon v. Dana.....	<i>Loan of Servant</i>	69 N. H. 264 ...	170
Garland v. Aurin.....	<i>Real Property</i>	103 Tenn. 555 ...	699
Goldberg v. Ahnapée etc. Ry. Co..	<i>Baggage</i>	105 Wis. 1	899
Gray v. Kaufman etc. Co.....	<i>Landlord and Tenant</i>	162 N. Y. 388...	327
Griffin v. State.....	<i>Homicide</i>	{ 40 Tex. Cr. } Rep. 312	718
Guinn v. Ohio River R. R. Co....	<i>Eminent Domain</i> ...	46 W. Va. 151..	806
Gunderson v. Swarthout.....	<i>Fixtures</i>	104 Wis. 186....	860
Hammond v. Chamberlain Bank- ing House.....	{ <i>Judicial Sales</i>	58 Neb. 445....	106
Hanson County v. Gray.....	<i>Action for Taxes</i> ...	12 S. Dak. 124 .	591
Harbison v. Knoxville Iron Co....	<i>Constitutional Law</i> ..	103 Tenn. 421...	682
Harrington v. Pier.....	<i>Charitable Uses</i>	105 Wis. 485.....	924
Harris v. Orr.....	<i>Exrs. and Admrs.</i> ..	46 W. Va. 261..	815
Hart v. Moulton.....	<i>Res Judicata</i>	104 Wis. 349.....	881
Harter v. Mechanics' Nat. Bank...	<i>Forged Checks</i>	63 N. J. L. 578..	224
Hascall v. King.....	<i>Wills—Trusts</i>	162 N. Y. 134 ...	302
Hedding v. Gallagher.....	<i>Railroads—Hackmen</i>	69 N. H. 650...	204
Hoffman v. Dixon.....	<i>Sale—Warranty</i>	105 Wis. 315....	916
Home Fire Ins. Co. v. Kuhlman...	<i>Vacant Building</i>	58 Neb. 488....	111
Howard v. Clark.....	<i>Merger of Estates</i> ..	71 Vt. 424.....	782
Hubbard v. Chicago etc. Ry. Co...	<i>Wrongful Death</i>	104 Wis. 160....	855
In re Tod.....	<i>Extradition</i>	12 S. Dak. 386..	616
Jamieson v. Wiggin.....	<i>Judges</i>	12 S. Dak. 16..	585
Johnson v. State.....	<i>Forgery</i>	{ 40 Tex. Cr. } Rep. 605	742
Kettleschlager v. Ferrick.....	<i>Fraud, Conveyance</i> ..	12 S. Dak. 455..	623
Kiamath Falls v. Sachs.....	<i>Municipal Bonds</i> ...	35 Or. 325.....	501
Knights v. State.....	<i>Arson—Insanity</i> ...	58 Neb. 225....	78

NAME.	SUBJECT.	REPORT.	PAGE.
Knopf v. People.....	<i>Special Legislation</i> ..	185 Ill. 20.	17
Krug v. Pitass.....	<i>Libel</i>	162 N. Y. 154. ...	317
Lewis v. Symmes.....	<i>Injunction</i>	61 Ohio St. 471. ...	428
Locke v. Post.....	<i>Homestead</i>	71 Vt. 343.	778
Longfellow v. Barnard.....	<i>Fraud. Conveyance</i> ..	58 Neb. 612....	117
Lothrop v. Marble.....	<i>Specific Performance</i>	12 S. Dak. 511..	626
Lynde v. Lynde.....	<i>Alimony</i>	162 N. Y. 405... 332	
Mack v. Prang.....	<i>Neg. Instruments</i> ...	104 Wis. 1.	848
Matter of Andrews.....	<i>Wills—Signature</i> ...	162 N. Y. 1.	294
Matter of Stickney.....	<i>Wills</i>	161 N. Y. 42....	246
McClure v. Law.....	<i>Corporations</i>	161 N. Y. 78....	262
McGhee v. Wells.....	<i>Fraud. Conveyance</i> ..	57 S. C. 280....	567
Meigs v. Roberts.....	<i>Retroactive Laws</i> ...	162 N. Y. 371... 322	
Miller v. State Board of Agriculture.	<i>Mandamus</i>	46 W. Va. 192..	811
Miller v. White.....	<i>Attachment</i>	46 W. Va. 67... 791	
Mound v. Barker.....	<i>Illegal Contracts</i>	71 Vt. 253.....	767
Murtey v. Allen.....	<i>Foreign Receivers</i> ...	71 Vt. 377.....	779
Nanz v. Park Co.....	<i>Mechanic's Lien</i>	103 Tenn. 299. . .	650
National Bank of Commerce v. Feeney.....	{ <i>Neg. Instruments</i> ...	12 S. Dak. 156..	594
New England Fire Ins. Co. v. Haynes.....			
New York Life etc. Co. v. Viele.....	<i>Wills</i>	161 N. Y. 11....	238
Nottage v. Portland.....	<i>Curative Statute</i>	35 Or. 539.....	513
Odin Coal Co. v. Denman.....	<i>Negligence—Mines</i> ..	185 Ill. 413.	45
Ohio etc. Torpedo Co. v. Fishburn.	<i>Opinion Evidence</i> ...	61 Ohio St. 608. ...	437
Oliver v. Jersey City.....	<i>Office and Officers</i> ..	63 N. J. L. 634. ...	228
O'Rourke v. Citizens' St. Ry. Co...	<i>Railway Tickets</i>	103 Tenn. 124....	639
Pabst Brewing Co. v. Melms.....	<i>Partition</i>	105 Wis. 441....	921
Parrish v. Mahany.....	<i>Bona Fide Purchaser</i>	12 S. Dak. 278..	604
Payne v. State.....	<i>Rape</i>	{ 40 Tex. Cr. } Rep. 202	712
Perrault v. Shaw.....	<i>Mechanic's Lien</i>	69 N. H. 180 ...	160
Perugi v. State.....	<i>Homicide</i>	104 Wis. 230....	865
Plummer v. Ricker.....	<i>Vicious Dog</i>	71 Vt. 114.....	757
Ralston v. Weston.....	<i>Adverse Possession</i> ..	46 W. Va. 544..	834
Ranchau v. Rutland R. R. Co.....	<i>Baggage</i>	71 Vt. 142.....	761
Raudabaugh v. Hart.....	<i>Vendor and Purch'r</i>	61 Ohio St. 73..	361
Richardson v. Bailey.....	<i>Attachment</i>	69 N. H. 384....	176
Robertson v. Blair.....	<i>Judgments</i>	56 S. C. 96....	543
Rodgers v. Clement.....	<i>Partnership</i>	162 N. Y. 422... 342	
Rose v. Hale.....	<i>Wills</i>	185 Ill. 378.....	40
Ruhstrat v. People.....	<i>Constitutional Law</i> ..	185 Ill. 133.....	30
Rustin v. Standard Life etc. Ins. Co.	<i>Accident Insurance</i> ..	58 Neb. 792....	136
Saunders v. Eastern etc. Brick Co..	<i>Master and Servant</i> ..	63 N. J. L. 554. ...	222
Schneider v. Hutchinson.....	<i>Adverse Possession</i> ..	35 Or. 253.....	474
Secound Nat. Bank v. Weston.....	<i>Neg. Instruments</i> ...	161 N. Y. 520... 283	

NAME.	SUBJECT.	REPORT.	PAGE.
Selleck v. Janesville.....	<i>Injury to Wife</i>	104 Wis. 570.....	892
Siglin v. Coos Bay Co.....	<i>Defective Fence</i>	35 Or. 79.....	463
Sloan v. Gibbes.....	<i>Neg. Instruments</i> ...	56 S. C. 480.....	559
Sloan v. Hunter.....	<i>Fraud. Conveyance</i> ..	56 S. C. 385.....	551
Small v. Elliott.....	<i>Evidence</i>	12 S. Dak. 570..	630
Springer v. Law.....	<i>Judicial Sales</i>	185 Ill. 542.....	57
Squier v. Hanover Fire Ins. Co....	<i>Renewal of Policy</i> ...	162 N. Y. 552...	349
Stafford v. Produce etc. Banking Co.	<i>Lien on Stock</i>	61 Ohio St. 160.	371
Stanford v. Howard.....	<i>Gaming</i>	103 Tenn. 24....	635
State v. Chapman.....	<i>Constitutional Law</i> ..	56 S. C. 420....	557
State v. Griffin.....	<i>Police Power</i>	69 N. H. 1.....	139
State v. Liffing.....	<i>Osteopathy</i>	61 Ohio St. 39..	358
State v. McGuire.....	<i>Official Bonds</i>	46 W. Va. 328..	822
State v. Taylor.....	<i>Rape</i>	57 S. C. 483....	575
St. Lawrence v. Gross.....	<i>Injunction</i>	12 S. Dak. 350..	612
Striegel v. Harding.....	<i>Cloud on Title</i>	12 S. Dak. 342..	607
Sullivan v. Dunham.....	<i>Blasting</i>	161 N. Y. 290...	274
Thomas v. State.....	<i>Forgery</i>	{ 40 Tex. Cr. } Rep. 562 }	740
Thompson Co. v. Whitehed.....	<i>Assignm't for Cred'rs</i>	185 Ill. 454.....	51
Tidball v. Young.....	<i>Admr's Bond</i>	58 Neb. 261....	98
Title Guarantee Co. v. Wrenn.....	<i>Mechanic's Lien</i>	35 Or. 62.....	454
Turnipseed v. Sirrine.....	<i>Wills</i>	57 S. C. 559....	580
Van Santvoord v. Roethler.....	<i>Limitation of Actions</i>	35 Or. 250.....	472
Veitch v. Cebell.....	<i>Garnishment</i>	105 Wis. 260....	914
Wadsworth v. Murray.....	<i>Wills</i>	161 N. Y. 274...	265
Walsh v. Barron.....	<i>Street Assessments</i> ..	61 Ohio St. 15..	354
Warren v. Buck.....	<i>Caveat Emptor</i>	71 Vt. 44.....	754
Wheeling etc. R. R. Co. v. Koontz..	<i>Stoppage in Transitu</i>	61 Ohio St. 551.	435
Whidden v. Cheever.....	<i>Quarantine</i>	69 N. H. 142...	154
Willey v. Hodge.....	<i>Reformation</i>	104 Wis. 81.....	852
Worth v. Norton.....	<i>Process</i>	56 S. C. 56.....	524

AMERICAN STATE REPORTS.

VOL. LXXVI.

/

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

KNOPF v. PEOPLE.

[185 ILLINOIS, 20.]

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under a constitutional provision that special laws shall not be passed in certain enumerated cases, and that in "all other cases where a general law can be made applicable, no special law shall be passed," the legislature may determine under the latter clause whether the specified condition exists, but as to the enumerated subjects the prohibition is absolute, and the question whether a statute upon an enumerated subject is within the prohibition against the passage of a special law is for the court and not for the legislature to determine.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—A statute attempting to limit the aggregate amount of tax levies which may be certified to the county clerk by municipalities in counties containing a certain number of inhabitants to a certain per cent per annum violates a constitutional provision absolutely prohibiting the passage of any special law incorporating cities, towns, or villages, or changing or amending their charters.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under a constitutional provision absolutely prohibiting special legislation on certain enumerated subjects, a particular county or city cannot be separated or singled out of such enumeration for special legislation, on the ground that its circumstances and conditions are different from other counties or cities.

CONSTITUTIONAL LAW—CLASSIFICATION.—The legislature may by general law classify counties and other municipalities on the basis of the population therein.

CONSTITUTIONAL LAW—LIMITATION ON LEGISLATION.—The legislature on which an absolute limitation is imposed by the constitution cannot finally determine the question of such limitation, and when such question arises in a judicial proceeding, the court must compare the statute with the fundamental law, and if they are found to be in conflict, must enforce the limitation, without regard to the reasons operating upon the minds of the legislators when enacting the law.

TAXATION—ILLEGAL LEVY.—If, under statutory provisions, taxes levied for school purposes and for school building purposes cannot be commingled, nor taxes levied for one purpose applied to the other, items for educational purposes improperly included in the tax levy for school building purposes cannot be held valid, though the whole tax levied does not equal the amount authorized to be levied for either purpose alone.

Pence, Carpenter & High, J. A. Johnson, county attorney, and F. L. Shepard, for the appellant.

C. M. Walker, corporation counsel, C. C. H. Fyffe, D. J. McMahon, J. J. Herrick, F. J. Loesch, and A. B. Force, for the appellees.

24 CARTWRIGHT, C. J. In each of these cases a petition was filed in the circuit court of Cook county against the plaintiff in error, county clerk of said county, alleging that the provision of section 49 of the act for the assessment of property, in force July 1, 1898, limiting the aggregate of all the levies certified by the municipalities of said county to said county clerk to five per centum, under which the county clerk claimed the right to act, was unconstitutional and void, and praying for a writ of mandamus to compel him to compute the rates and extend the taxes due the relators in accordance with the law. In one case **25** the petition was filed on the relation of the city of Chicago and in the other on the relation of the board of education of said city. The defendant interposed a demurrer to each petition, which was overruled, and he standing by the same, judgments were entered and writs ordered compelling him to compute and extend said taxes in accordance with the prayers of the petitions. Writs of error were sued out from this court to review the judgments, and the causes have been heard together.

In the case of *People v. Knopf*, 183 Ill. 410, we considered the same question raised in these cases as to the validity of said provision of section 49, and were reluctantly compelled, on the clearest grounds, to hold it unconstitutional and void, as a direct and palpable violation of the prohibition against special and local laws. It is not necessary to repeat here the well-worn and fundamental rules there stated, but counsel for plaintiff in error have presented some arguments which they insist have not been before presented or considered and which they claim are sufficient to sustain the act, and these will receive due consideration.

One of these arguments is, that the prohibition of the con-

stitution against local or special laws does not apply where the conditions, circumstances or situations of municipalities differ, so as to require or permit a classification of such municipalities; that the question whether the county of Cook, including its various municipalities, is different in conditions, circumstances, or situations from other counties, is one which the legislature must determine for themselves as a fact before they legislate, and in the ascertainment of the fact may adopt their own rules of evidence; that the legislature decided that there was such a difference in the circumstances and situations of counties having a population of over 125,000, when compared with other counties of the state, as required legislation applicable only to municipalities in such counties, and that their decision of that question cannot ²⁶ be reviewed by this court. The effect of the argument is, that the legislature are the final judges of the meaning and effect to be given to the constitution, and that it shall be binding on them only so far as they decide it shall be. It is true that, under the general provision that a special or local law shall not be passed where a general law can be made applicable, the existence of the specified condition may be determined by the legislature. Under that provision a special law may be enacted where a general law cannot be made applicable, and that preliminary question may be decided by the legislature: *Owners of Lands v. People*, 113 Ill. 296. As to certain subjects, however, the people, in the fundamental law, made a hard and fast rule, not subject to any condition or exception, prohibiting the enactment of special or local laws. Section 22 of article 4 of the constitution prohibits the general assembly from passing local or special laws in certain enumerated cases. As to those subjects the prohibition is absolute, and not conditional. Among them is, "incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village," which is violated by section 49. It was never intended to put a law passed in violation of the prohibition beyond the power of review by the courts, and the question whether a particular law upon such a subject is within the prohibition is for the courts, and not for the legislature: *Sutherland on Statutory Construction*, sec. 117. Within the enumerated subjects Cook county cannot be singled out for legislation on the ground that its circumstances and conditions are different from other counties, nor can the city of Chicago be singled out and separated from other cities of the state and made the subject of special legislation: *Devine v. Board of*

Comms., 84 Ill. 590; *Kingsbury v. Sperry*, 119 Ill. 279; *People v. Meech*, 101 Ill. 200; *People v. Board of Trustees*, 170 Ill. 468. If the legislature can pass a law for Cook county, as contended, it could single out for special legislation each county in the state other ²⁷ than Cook county, and each city as well as the city of Chicago, on the ground of alleged differences in circumstances and conditions, and this would be to nullify the constitutional provision. The legislature may, however, in the enactment of general laws, classify counties and other municipalities, and we have sustained legislation relating to counties classified on the basis of the population of counties, laws relating to cities where the classification was based on the population of cities, and laws affecting towns where towns were classified according to population. In any case, it cannot be that the legislative body on which an absolute limitation is imposed shall finally determine the question of such limitation, but when the question arises in a judicial proceeding the court must compare the law with the fundamental law, and, if it is found to be in conflict, must enforce the limitation. Judge Cooley, in speaking of this power says: "The right and the power of the courts to do this are so plain, and the duty is so generally—we may now say universally—conceded, that we should not be justified in wearying the patience of the reader in quoting the numerous authorities on the subject": *Cooley's Constitutional Limitations*, 45. Indeed, counsel, at the conclusion of their argument on this point, admit that, manifestly, if there is no distinction in the conditions and circumstances of the municipalities situated in Cook county from those situated in other counties, the legislature would have no power or jurisdiction to determine that there was, but they say that if there is a difference the court should not go into an examination of the extent of such difference.

Another argument is based upon the proposition of counsel stated as follows: "The legislature, by section 49, did not attempt to take away any power from any individual municipality to levy a tax at a certain rate as established by the general law. Section 49 does not touch that power, but it simply undertakes to provide that, in making such assessment, if the aggregate rates which ²⁸ were permissible under the general law (not the individual rates) should exceed five per cent. that then such aggregate rates must be reduced to five per cent." It is said, in substance, that the powers of the various municipalities to levy taxes up to a certain rate are not affected; that they may levy taxes and certify their levies to the clerk, but the law

simply provides that the clerk shall not put the taxes on the books, and merely interferes with and prohibits the collection. The argument is, that therefore the provision is not obnoxious to the constitutional prohibition, because it does not amend any charter or repeal any charter power. Section 1 of article 8 of the general incorporation act, under which the relator, the city of Chicago, and many municipalities in Cook county, are organized, provides that the city council or boards of trustees may, by ordinance, levy the total amount of appropriations, to be collected from the tax levy of the fiscal year, not exceeding two per cent of the valuation, exclusive of the amount levied for the payment of bonded indebtedness or interest thereon, upon all the property subject to taxation within the city; that a certified copy of such ordinance shall be filed with the county clerk, and that he shall extend the tax upon the collector's books. Section 2 provides that the tax so assessed shall be collected and enforced in the same manner and by the same officers as state and county taxes, and shall be paid over to the treasurer of the city or village. To say that the provision of section 49 that the county clerk shall not extend the tax certified to him, but shall reduce it pro rata, so that the aggregate, with all other taxes, shall not exceed five per cent, and that no more shall be collected, is so plainly an attempt to amend this charter provision that no argument can make it plainer. The town of Cicero, in Cook county, is organized under a special charter, and is not subject to the limitation of two per cent in the general incorporation act: *Cicero v. McCarthy*, 172 Ill. 279. The restriction ²⁹ of section 49 is not only an attempted amendment of the general incorporation act as to cities and villages located in certain counties, but also of the special charter of said town. The town of Cicero is within the terms and the necessary operation of the act which attempts to add to such charter the restriction in question.

Again, it is insisted that there are actual grounds of difference between the municipalities or taxing districts in Cook county and those outside of that county, which support the restriction. The first of these is, that in Cook county there are a greater variety and number of different taxes, and of corporate authorities authorized to levy taxes, than in other portions of the state. In that county there is taxation by the sanitary district and for the public parks, and taxation to pay the indebtedness for the Columbian Exposition, which other portions of the state do not have to pay. It is urged that these facts

furnish a ground for the restriction upon the aggregate rate. If that fact could have any effect, it seems that it would be a reason for allowing a larger aggregate to meet these additional requirements and to support the additional burdens, and that it would furnish no ground for reducing such aggregate. Surely, it is no reason for restricting the taxes below those common to the municipalities of the state. Another alleged ground is, that the taxable wealth of the municipality of Cook county is much greater than outside of that county. The fact does not appear from the record, but counsel give figures in their brief from which it appears that the equalized valuation of property in Evanston for the purpose of taxation averages \$195.30 per capita, while in the city of Aurora it is \$192.79, in the city of Quincy \$113.35, and in the city of Joliet \$105.71. If these figures are accepted, they show that there is no substantial difference between Evanston, in Cook county, and Aurora, in Kane county, and that the act is special; and by the same reasoning the city of Aurora could be singled out for separate and distinct legislation,³⁰ on the ground that the equalized valuation per capita is nearly double that of the city of Joliet. The statement destroys the argument. By the same process of reasoning all the counties and cities in the state might be separated. The county or city having the next largest valuation to Cook county could be separated from the others and made the subject of special law. But a conclusive answer to both these supposed grounds of difference is, that if the number of taxing authorities or the taxable wealth of the municipalities would justify different legislation, the act is not based on any such grounds of difference. It proceeds on no supposed difference of that kind, but necessarily excludes it from the classification. It applies equally to every county of a certain population, regardless of wealth, and to every municipality or taxing district in such county, regardless of the population, wealth, or any other characteristic of the municipality or taxing district, except its location in such a county. It assumes to regulate the powers of small municipalities with a population of 1,500 and the city of Chicago with a population of 2,000,000. The legislature did not provide that districts with a certain number of taxing authorities or with certain wealth should be included, and did not bring or attempt to bring within its operation all municipalities or taxing districts in the same situation or circumstances in that regard.

It is also said by counsel that the legislature had in view what they say is a notorious fact—that in Cook county vast amounts of personal property had never been returned by the owners and had gone entirely untaxed; that to induce the people to be honest, and not to make false returns of their taxable property, but to bear their just portion of the public burdens, the legislature might properly provide that they would not have to pay more than a certain rate in the aggregate; that it was known that any truthful return of property in that county would enormously increase the assessment, and that these facts ³¹ furnish a natural and reasonable basis for this special law. It is further asserted that the legislature enacted the provision in question as a promise to the taxpayers of that particular county that if they would make honest returns of their property they should have the benefit of the limitation; that the offer was largely accepted and the anticipated result realized, and that the courts should adhere to the bargain. None of these statements have any foundation in the record, and if they had, the reasoning is not applicable on the question of the constitutionality of the statute, which is the only question before the court. The reasons which counsel say operated on the minds of the legislators in enacting the statute cannot be ground for holding valid a law passed in violation of a constitutional provision. Whatever merit there may be in an argument that taxpayers of a particular county have been accustomed to make false returns of their property and to escape the burdens of taxation, which the law contemplates shall fall equally upon all in proportion to the value of their property, and that they have been deceived and betrayed into truthful disclosures and obedience to the law because of the supposed bargain, there is no evidence whatever of the facts so alleged and insisted upon by counsel. We are unable to consider such argument or make it a basis for our decision. If the law is local and special in its character and within the enumerated cases prohibited by the constitution, we must declare it invalid.

These are all the arguments in support of the provision, and none of them are sufficient to sustain it.

In awarding the writ in the case of the board of education, the circuit court deducted from the amount levied by the city council for building purposes the sum of \$625,500, and the defendant in error in that case assigns a cross-error upon that action of the court. The board of education is required to communicate to the city council of the city of Chicago respect-

ing the schools and school ³² funds and the management thereof, and the law authorizes the city council, in making its appropriations for school purposes and levying taxes, to levy a tax not exceeding two and a half per cent for educational and two and a half per cent for building purposes. The board of education in this case made a requisition for the fiscal year for educational purposes (less the revenue from the school fund) of \$5,524,161.17, which was appropriated and levied by the city council, and about this tax there is no dispute. The board also made requisition for \$2,000,000, which purported to be for building purposes and other expenses which, under the law, are not building purposes. The council made the appropriation of \$2,000,000 accordingly, and included it in the ordinance levying taxes in a lump sum. The court made an investigation of the separate amounts which, by the record of the board of education, went to make up the \$2,000,000, and allowed that portion which was for the purchase of schoolhouse sites, new buildings, and permanent improvements and pro rata of loss and cost of collection, but deducted the other items, amounting to said sum of \$625,500. The argument in support of the cross-error assigned is, that the city council had power to levy a tax not exceeding two and a half per cent for educational purposes alone; that the entire tax levied for educational and building purposes was less than said rate of two and a half per cent, and that therefore the items for educational purposes included in the total for building purposes are valid.

It is true that the council had power to levy as much as the whole amount which was levied, and might have levied it for educational purposes alone, if required for that purpose, but it was not all required or levied for that purpose. The statute authorizes a levy for two separate purposes, and requires the amount to be levied for each to be levied separately in specific sums. The certified copy of the ordinance was the only warrant to the defendant for extending the tax, and some of the items ³³ included in the gross sum for building purposes show for themselves that they were not for such purposes, and there was no way for the clerk to separate them. Under such a levy the defendant was not required to extend any of the tax of \$2,000,000. The ordinance showed that a part of that sum was for general repairs, incidental expenses, and other things not included in building purposes. The ordinary expenses of the school and ordinary repairs are included within the tax

levied for educational purposes, and the tax for building purposes is to provide means necessary to meet the building of schoolhouses: *O'Day v. People*, 171 Ill. 293. The relator could not have compelled the defendant to extend any portion of the tax where the levy furnished no means of showing what was legal and what was not, and the action of the court in making the investigation and compelling a levy of that portion which was actually intended for building purposes was in their favor. Some of the items excluded may have been fairly included under the head of building purposes, but we do not consider that question, for the reason that the court might properly have refused relief as to the whole. We cannot assent to the proposition that because the board of education might have levied a tax which would have been valid, a tax not authorized by the statute should be held valid. To say that a city council or board of education may commingle the educational and building funds, or levy sums for one purpose and apply them to another, would defeat the intention of the statute and be disastrous to the taxpayer.

The judgment of the circuit court is affirmed.

Magruder, J., did not concur in all that is said in this opinion.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Classification on the basis of population in a statute relating to the machinery and powers of municipalities is legitimate if such population bears a reasonable relation to the necessities of such municipalities: *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600; but a law, though general in form, legislating for a city of a certain class or population, which cannot become applicable to any other city or cities, is special: Extended note to *State v. Ellet*, 21 Am. St. Rep. 785-788. See, also, *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381.

STATUTES, SPECIAL—WHAT ARE, A QUESTION FOR WHOM.—Whether or not a particular act conforms to the constitutional provisions respecting special legislation is a judicial question, with the exception that whether a general law can be made applicable to the subject matter included within the operation of the statute under consideration is exclusively a legislative question: See the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780.

BEST BREWING COMPANY v. KLASSEN.

[185 ILLINOIS, 37.]

A CORPORATION CAN DO ONLY SUCH ACTS as are within the scope of its charter, and if any particular act was not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act can make it valid by way of estoppel.

CORPORATIONS—POWER TO BECOME SURETY.—A corporation organized to manufacture and sell beer, ale, and porter, and carry on a general brewing business, has no express or implied power to become a surety on an appeal bond between third parties, unless such act is reasonably necessary to accomplish a purpose for which the corporation was formed.

APPEAL—REVIEW OF FACTS.—QUESTIONS OF FACT material to a decision of the case are open to review in the appellate court, as a question of law under an assignment of error questioning the ruling of the trial court in refusing instructions.

Blum & Blum, for the appellant.

F. L. Salisbury, for the appellee.

38 WILKIN, J. This is an action of debt upon an appeal bond. In a forcible entry and detainer proceeding before a police magistrate, in the city of Chicago, appellee, as plaintiff, recovered a judgment against Ruel G. Rounds for restitution of certain property. Rounds appealed to the county court of Cook county, filing an appeal bond, as required by the statute. This bond was for two thousand dollars, conditioned as provided by statute in such cases, and was signed by Rounds and appellant as his surety, the latter's execution of it being as follows: "The Best Brewing Company of Chicago. [Seal] By Charles Hasterlik, its President. [Seal]"

In the county court judgment was again rendered for the plaintiff. Upon the failure of Rounds or the brewing company to comply with the terms of that judgment, this proceeding was commenced in the circuit court of Cook county to recover on the appeal bond. In defense to the action, the brewing company, by its pleadings, denied that the bond was its deed; alleged that the making of the same, as to it, was unauthorized, and that such act was not within the power of the corporation. Issues were joined and a trial had by jury. At the close of plaintiff's evidence, and again at the close of all the evidence, a motion was made to instruct the jury to find for the brewing company, but these motions were overruled. The court then took the case from the jury by instructing it to render a ver-

dict for the plaintiff, Klassen, for thirteen hundred and twenty-one dollars and fifty cents. This being done, judgment for that sum was duly entered, and appellant appealed to the appellate court for the first district, where the judgment below was affirmed, and it now brings the case here upon further appeal.

³⁹ The chief error insisted upon by appellant is, that the circuit court held the bond sued on to be its act and deed, the contention being, that the powers of the company, as a corporation, are limited by its charter to those which are express or implied; that its express powers are to "manufacture and sell beer, ale, and porter and carry on a general brewing business in all its branches"; that the implied powers it possesses are only those which may be implied as necessary to carry into effect one or more of those expressed, and that the signing of this appeal bond comes under neither of these heads, but was an act *ultra vires*, and therefore not binding upon the corporation. Appellee insists: 1. That the act was within the corporate power of appellant; or 2. Although in excess of its corporate power, yet, having made the bond and enjoyed certain benefits arising therefrom, it is now estopped to make the defense of *ultra vires*.

The general rule is, that a corporation can do only those acts which are within the scope of its charter, and if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation it is void, and no subsequent act could make it valid by way of estoppel. It was so held in *National Home Bldg. Assn. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, where the decisions of this court are reviewed, and we there said: "If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power." In that case it is also said: "The cases in this court where the corporation has been held to be estopped have been ⁴⁰ where the act complained of was within the general scope of the corporate powers." In the case of *Heims Brewing Co. v. Flannery*, 137 Ill. 309, relied upon by appellee, the defense of *ultra vires* was invoked, and it was

held the corporation was estopped to make that defense, inasmuch as it had enjoyed the benefit of the act; but there the act in question (which was the leasing of a building in which to conduct a saloon) was within the express power of the corporation.

We think the primary question here is not whether appellant has reaped a benefit from the act of becoming surety for Rounds upon the bond, but whether the act of signing it was within the scope of its corporate authority. The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer, and porter and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company and the signing of appeal bonds as surety. The instrument was executed in a suit not by or against the corporation, but by a third person against another to recover possession of a house. Prima facie, the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed—it would have been within the scope of the corporate power. But it cannot be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers ⁴¹ conferred by its charter, a corporation “may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business”: *Clark v. Farrington*, 11 Wis. (*324) 340.

In the case of *Lucas v. White Line Transfer Co.*, 70 Iowa, 541, 59 Am. Rep. 454, where a corporation chartered for the purpose of doing a “general freight and transfer business, and such other business as may not be inconsistent therewith,” was sued upon a bond executed by it as surety with another corporation, the supreme court of that state said: “The plaintiff seeks to recover contribution from the corporation as cosurety on the bond of the brewing company, and claims: 1. That the

contract of suretyship was within the defendant's corporate powers; and 2. That if it were not within the defendant's corporate powers, it has so acted on the contract as to now estop it from pleading ultra vires. . . . Whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture." Quoting from other authorities, it is there further said: "It is no part of the ordinary business of commercial corporations, and, a fortiori, still less so of noncommercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are ultra vires, whether in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others: Green's Brice's Ultra Vires, 252; Madison Plankroad Co. v. Watertown Plankroad Co., 7 Wis. 59." These authorities are clearly in point here, and lead to the conclusion that the act of appellant in ⁴² signing this bond, instead of being the exercise of a delegated authority, was an attempt to execute powers not conferred upon it, either expressly or by implication.

In reaching this conclusion we have not overlooked the contention of appellee that the execution of the bond by appellant was in furtherance of its business, and that this fact has been found adversely to appellant by the appellate court and is therefore not open to review here. This position is based upon the assumption that Rounds was, at the time of the suit against him for possession of the premises, engaged in selling beer in the house, and that appellant was furnishing him the beer; that the bond was executed on the part of the brewing company in order to enable him to retain possession of the property and continue his business therein and to make further purchases from the company. If all this were true, the benefits to accrue to the corporation would certainly be of the most precarious and remote character. But we have searched the record in vain for evidence tending to support the assumption. The testimony wholly fails to prove, nor does it fairly tend to prove, that Rounds was engaged in any occupation calculated to promote the business of appellant, or that the business of the corporation was promoted or benefited, in any degree, by reason of

the execution of the bond. Treating these as questions of fact material to the decision of the case, they are open to review in this court as a question of law, under the assignment of errors questioning the ruling of the trial court in refusing the motion of defendant for a peremptory instruction to find for it, made at the close of all the evidence.

Plaintiff below wholly failed to make out a cause of action against this appellant, and the circuit court improperly refused to instruct the jury to return a verdict in its favor. The judgment of the appellate court will accordingly be reversed.

CORPORATIONS—CONTRACT OF SURETYSHIP—ESTOPPEL. A corporation organized for a "general freight and transfer business" has no power to become a surety nor to assume the principal's debt, and is not estopped by such assumption, made by its officers without the authority of the directors or stockholders: *Lucas v. White Line Transfer Co.*, 70 Iowa, 541, 59 Am. Rep. 449. However, it seems that contracts of suretyship entered into by a corporation in the legitimate furtherance of its purposes and business are not *ultra vires*: Extended note to *In re Assignment Mutual Ins. Co.*, 70 Am. St. Rep. 163, 164. See this note, pages 165-169, for the doctrine of estoppel as applied to *ultra vires* contracts.

RUHSTRAT v. PEOPLE.

[185 ILLINOIS, 133.]

CONSTITUTIONAL LAW—CHOICE OF OCCUPATION.—The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the constitution, is included in the right to the pursuit of happiness.

CONSTITUTIONAL LAW.—"Liberty," as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but also embraces the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, and to advertise it in any legitimate way, subject only to the restraints necessary to secure the common welfare.

CONSTITUTIONAL LAW—CHOICE OF OCCUPATION AND RIGHT TO ADVERTISE—USE OF PICTURE OF NATIONAL FLAG.—The right of the citizen, guaranteed by the constitution, to pursue the lawful calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademark, unless thereby the public safety, welfare, or comfort is interfered with.

CONSTITUTIONAL LAW.—POLICE POWER is limited to enactments which have reference to the public health or comfort, or the safety or welfare of society, and laws which impose penalties on persons and interfere with the personal liberty of the citizen

cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment.

POLICE POWER—SCOPE OF LEGISLATIVE DISCRETION.—It is for the legislature to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of this legislative discretion is not subject to review by the courts when the measures adopted are calculated to protect public health and secure public comfort, safety, or welfare, but the measures so adopted must have some relation to the ends thus specified.

POLICE POWER—LEGISLATIVE DISCRETION.—The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen, and its determination upon this question is not final or conclusive.

POLICE POWER—REGULATION OF BUSINESS.—If the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which such business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment.

CONSTITUTIONAL LAW—USE OF NATIONAL FLAG FOR ADVERTISING PURPOSES.—A statute absolutely prohibiting the use of a likeness of the national flag or emblem for any commercial purposes, or as an advertising medium is unconstitutional and void as interfering with the personal liberty and privileges of the citizen.

Hofheimer & Pflaum, for the appellant.

C. S. Deneen, state's attorney, and F. L. Barnett, for the people.

137 **MAGRUDER, J.** The provisions of the constitution of Illinois, which the terms of the act of April 22, 1899, known as the "flag law," are alleged to contravene, are sections 1, 2, and 4 of article 2 and section 22 of article 4. Section 1 of article **138** 2 is as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." Section 2 is as follows: "No person shall be deprived of life, liberty, or property without due process of law." Section 4 of the same article provides that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty," etc. Section 1 of article 14 of the amendments to the constitution

of the United States is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The expression, "life, liberty, and the pursuit of happiness," is general in its character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation: Black on Constitutional Law, 404. "The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the constitutions, is included in the right to the pursuit of happiness": Black on Constitutional Law, 411.

In *Powell v. Pennsylvania*, 127 U. S. 678, the general proposition that the enjoyment by the citizen, upon terms of equality with all others in similar circumstances, ¹³⁹ of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guaranteed by the fourteenth amendment, was assented to by the supreme court of the United States, as embodying a sound principle of constitutional law. In the latter case, it was also held that, although the power and discretion which a state legislature has in the matter of promoting the general welfare and of employing means to that end are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property.

In *Allgeyer v. Louisiana*, 165 U. S. 578, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition, that 'all men are created equal: that they are endowed by their Creator with certain inalienable rights; and that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." It was also said in this case

that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." It was also there said: "If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen": *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746.

In *Braceville Coal Co. v. People*, 147 Ill. 66, 71, 37 Am. St. Rep. 206, we said: "Liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, ¹⁴⁰ but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare": *Frerer v. People*, 141 Ill. 171; *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465; *Live Stock etc. Assn. v. Crescent City etc. Co.*, 1 Abb. (U. S.) 388; *Slaughterhouse Cases*, 16 Wall. 36; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863.

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the constitution there made, plaintiff in error had not only the right to choose the business in which he was engaged as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in "the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it": *Black on Constitutional Law*, 412. In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attention of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trademark. The use of trademarks is as old as commerce itself. The conventional trademark is a part of what is called "the symbolism of commerce": *Browne on Trademarks*, 2d ed., secs. 1, 26.

It is allowable to use a picture as a trademark; and a picture made up of many objects in many colors may be a trademark: Browne on Trademarks, secs. 258, 259. Browne, in his work on Trademarks, section 265, says: "Color may be of the essence of a mark of manufacture or commerce, known as a trademark. National flags are sometimes blended with other objects to catch the eye. They are admirably ¹⁴¹ adapted to all purposes of heraldic display, and their rich glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. . . . One flag printed in green may catch the eye of a son of the Emerald Isle; . . . another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped."

The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademarks, unless thereby the public safety, welfare, or comfort is interfered with.

It is claimed on the part of the people that the flag law in question was enacted by the state legislature in the exercise of its police powers. The law is justified upon the alleged ground that it is an enactment under and by virtue of the police power of the state; and that, being enacted under and by virtue of that power, the courts cannot exercise a supervision over the wisdom and judgment of the legislature in its passage. It is claimed that the law tends to elevate the morals and promote the welfare of the public, and that, as such, it is a valid exercise of legislative power.

The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment. It is for the legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislature are calculated to protect the public health ¹⁴² and secure the public comfort, safety, or welfare; but the measures so adopted must have some relation to the ends thus specified:

Ritchie v. People, 155 Ill. 98, 46 Am. St. Rep. 315. The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment: *Tiedeman on Limitation of Police Power*, sec. 3; *In re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465; *Cooley's Constitutional Limitations*, 6th ed., 606, 607, 744; *Ex parte Whitwell*, 98 Cal. 73, 35 Am. St. Rep. 152; *Frorer v. People*, 141 Ill. 171; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315.

In *Mugler v. Kansas*, 123 U. S. 623, it was said: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the constitution." In *Eden v. People*, 161 Ill. 296, 308, 52 Am. St. Rep. 365, we said: "If the act ¹⁴³ were one calculated to promote the health, comfort, safety, and welfare of society, then it might be regarded as an exercise of the police power of the state. In *Toledo etc. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that, if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will, in such case, be an unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void."

It is difficult to see how the flag law of April 22, 1899, tends in any way to promote the safety, welfare, or comfort of society. The use of a likeness of the flag upon a label or as part of the trademark of a business man in the lawful prosecution of his business, cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, is a matter about which men of equal honesty and patriotism may differ.

The act in question is severe in its terms. It makes it the duty of the state's attorney to prosecute all persons guilty of a violation of the provisions of the act, and makes it the duty of sheriffs, deputy sheriffs, constables, and police officers to inform against all persons "whom there is probable cause to believe are guilty of violating the provisions of this act; one-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county. . . . Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail," etc. What is the offense ¹⁴⁴ for which these penalties are imposed? The using or displaying of the national flag or emblem or any drawing or likeness of the same "as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation, or organization," so using or displaying the same. Section 2 of the act provides that the use of the national flag or emblem for patriotic purposes shall not in any way be restricted. It is not altogether clear that a person might not make use of or display the national flag or emblem for a purpose intended to promote his own interests, and yet, at the same time, for an entirely patriotic purpose. It is not clear that the prohibition leveled against the use or display of the flag tends in any way to elevate the morals or promote the welfare of the public.

The flag is used, in the prosecution of commerce upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship navi-

gating under the flag and pass of a foreign country is to be considered as bearing the national character of the country under whose flag she sails. Under what is called, in international law, "the law of the flag," a ship owner, who sends his vessel into a foreign port, gives notice by his flag to all who enter into contracts with the ship master, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all: 1 *Bouvier's Law Dictionary*, Rawle's revision, 799, 800.

It is a doctrine of international law that a ship becomes hostile so soon as she hoists the enemy's flag; and while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel: 11 *Am. & Eng. Ency. of Law*, 480, note 3. It is difficult to see why, if in the prosecution of foreign commerce ¹⁴⁵ or trade, the flag is used to protect a ship and cargo and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trademark in the prosecution of domestic trade or business.

A flag is emblematic of the sovereignty of the power which adopts it. The American flag is emblematic of the sovereignty of the United States. Congress, by sections 1791 and 1792 of the Revised Statutes of the United States, has provided as follows: "The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. On the admission of a new state into the Union, one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding said admission."

In *Collector v. Day*, 11 Wall. 113, it was said: "The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states." The state of Illinois has never adopted a flag emblematic of its sovereignty. The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the national flag was adopted for the use of the citizens of the United States.

There is a difference between the privileges and immunities belonging to the citizens of the United States as such, and those belonging to the citizens of each state as such. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of ¹⁴⁶ its constitution, or its laws and treaties made in pursuance thereof; and it is these rights which are placed under the protection of Congress by the fourteenth amendment: *People v. Loeffler*, 175 Ill. 585; *Slaughterhouse Cases*, 16 Wall. 36. The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the states. The national government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed sections 1791 and 1792 above referred to, and has thereby taken jurisdiction of the subject matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the act prescribing and describing the national flag.

The use of the flag of the United States, as embodied in advertising sheets and placards and labels and in common-law trademarks, has received the unqualified approval of the whole commercial world. It has also received the sanction of those having in charge the execution of the trademark laws of the United States. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the United States with the knowledge of the national government. The absence of congressional prohibition against the usage and practice, thus indulged in with the knowledge of the general government, has created a "privilege" in the citizens of the United States to continue such use until withdrawn by the competent authority. An act of legislation passed by a particular state which deprives the citizen of such privilege contravenes that clause of the amendment to the national constitution which forbids any state to abridge the privileges and immunities of a citizen of the United States. If the state legislature can ¹⁴⁷ restrict the use of the national flag, and permit its use for one purpose, and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the state. But it cannot be pretended that

the state of Illinois has authority to prohibit the use of the national flag altogether. It necessarily follows that it has no authority to prohibit its use for certain purposes.

We are of the opinion that this law is unconstitutional, not only as infringing upon the personal liberty guaranteed to the citizen by both the federal and state constitutions, but also as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted to him by the federal constitution.

The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so not merely for the public benefit, but for the promotion of his own interests. By thus excluding artists or exhibitors from the inhibitions of section 1 of the act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the courts in this country. The legislature clearly has no power to deny to plaintiff in error the right to use the national flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and, at the same time, to permit artists or art exhibitors to use the same. The manner in which the act thus discriminates in favor of one class of occupations and against all others places it in opposition to the constitutional guaranties hereinbefore referred to: *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315.

¹⁴⁸ For the reasons herein set forth the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Wilkin and Carter, JJ., and Cartwright, C. J., dissenting.

CONSTITUTIONAL LAW. — CONSTITUTIONAL LIBERTY means not only freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; monographic note to *State v. Goodwill*, 25 Am. St. Rep. 870.

THE POLICE POWER CAN BE RESORTED TO for the purpose of preserving the public health, safety, or morals: *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201; but under its guise the legislature cannot arbitrarily invade private property or personal rights: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557.

POLICE POWER — PROVINCE OF LEGISLATURE AND COURTS.—It rests solely within legislative discretion, inside of constitutional limits, to determine when public safety or welfare requires an exercise of the police power: *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222; but a determination by the legislature as to what is a proper exercise of such power is not final, but is subject to the supervision of the courts: *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609; *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657.

ROSE v. HALE.

[185 ILLINOIS, 378.]

WILLS — CONSTRUCTION.—TRANSPPOSITION of the words of a will is only to be made when necessary to give effect to a meaning and purpose of the testator which is certain.

WILLS—CONSTRUCTION.—THE INTENT OF THE TESTATOR, if clearly disclosed by his will, must prevail, even if some words must be rejected to give effect to such intent.

WILLS — CONSTRUCTION — INTENT.—A will providing, "first," for the payment of the funeral expenses and debts of the testator, "second," a devise of all his real estate to his widow, "thirdly," certain specified personalty and all personal property not otherwise disposed of to her "whilst she remains my widow," creates only an estate for life in the widow in both the realty and personalty, as the word "thirdly" must be eliminated as a purposeless connecting word.

APPEAL.—AN ADMINISTRATOR WITH A WILL ANNEXED, who intervenes in a partition suit involving the construction of a will, and files a petition for the sale of the land to pay claims, cannot, after such petition is dismissed and an appeal taken, but not perfected, assign for error the dismissal of his petition upon an appeal by the defendant from the final decree in partition.

J. S. Winter and H. M. Waggoner, for the appellant.

M. P. Rice and T. C. Robinson, for the appellees.

Chiperfield, Grant & Chiperfield and L. Gray, for the intervenor.

378 BOGGS, J. This is a bill in chancery filed by Lucinda Hale, Catherine Severns, Phedora Combs, and Mariah Cluney, appellees, for the partition of certain real estate, the title **379** whereof formerly rested in one Reason Church, who died January 1, 1880. On the hearing the court construed the will of

said Reason Church to invest a life estate only in the land sought to be partitioned in Mariah Church, wife of the testator, and that the remainder in fee descended to the heirs at law of the said testator. The appellant by this appeal questions the correctness of the construction given said will by the court. He insists that the true construction of said will vested in the said Mariah Church the title to the lands in fee simple, subject to the condition she should not marry again, and defeasible on that condition. Said Mariah Church conveyed the land to the appellant and died without having again remarried. The position of the appellant is, the fee simple title to the said land rests in him.

The will of the deceased reads as follows:

"I, Reason Church, of Isabel, Fulton county, and State of Illinois, do make and declare this my last will and testament, in manner and form to-wit:

"First it is my will that my funeral expenses and all my just debts be fully paid.

"Second after the payment of my funeral expenses and debts I give devise and bequeath unto my beloved wife Mariah Church the farm on which we now reside, situate in said county and known and described as one hundred forty-five acres of the north-west quarter of section number thirty in township four north of range three east of the fourth principal meridian thirdly all the live stock horses cattle sheep hogs by me now owned and kept thereon also all the household furniture wagons, carriages and all my farming implements and all my personal property not herein enumerated or otherwise disposed of whilst she remains my widow. But if she should marry then it is my will that she divide the farm and give each of my children an equal share after taking her thirds and lastly I hereby constitute and appoint my said wife Mariah Church executor of this my last will and testament."

As to the true construction thereof it is said in the brief of appellant: "Anyone who is acquainted with philology and grammatical construction of the English language, by reading said will will perceive its second ³⁸⁰ and third clauses, as written, consist of three sentences. If 'a sentence is the expression of a thought in words,' as it has been defined, then a construction of this will would be: 1. An absolute devise in fee of the farm on which they resided to his wife; 2. A bequest of all his personal property to his wife so long as she remained his widow; and 3. A limitation to the devise in fee of his farm to the wife;

if she should marry again, she should divide the farm equally among his children, 'after taking her thirds.' That part of the third clause of said will in which the testator attempts to bequeath his personal property to his wife 'while she remains my widow' is obviously a parenthetical phrase, intervening between the devise in the second clause of the will and the concluding part of the third, limiting that devise to a third of the farm if his wife should marry, the remainder to be equally divided among his children. Certainly, that intervening sentence could be omitted without destroying the meaning of the composition in which it is found, which is the usual test as to whether a phrase is parenthetical or not. By such transposition, and thus placing the first and third of said sentences in their apparent natural relation to each other, the intent of the testator in his will becomes clear and obvious—that he intended to debase the devise of the fee of his farm to his wife from an absolute to a determinable fee, subject, however, to his wife's marrying again. The second clause clearly, in the first instance, was intended as a devise to his wife of an absolute fee to his farm; the first sentence of the third clause, by its position, should be taken as parenthetical, and considered as intended as a bequest of his personal property to his wife during her widowhood, and wholly disconnected with the devise in the second clause; and the second or concluding sentence of the third clause as intended as a limitation to the devise of the fee to the farm he had made to his wife in said second clause."

381 We agree with counsel for appellant that the unmistakable intention of the testator was to bequeath his livestock, etc., and all his personal property, to his wife "while she remained his widow." But we gather this intention by reading as one sentence that part of the will beginning with the word "second" and concluding with the word "widow." It will be observed that unless this part of the will is read as one sentence there is no gift or bequest of the livestock, etc., and personal property, for if the phrase relating to such personal property, etc., be regarded, as appellant insists it should, as but parenthetical and wholly disconnected from that portion of the will which relates to the real estate, then there are no words of gift, bequest, or devise applicable to said personal property. The phrase referred to as but parenthetical has no meaning if transposed from the position it occupies in the will. It must be construed and read as a part of the sentence, as we before indicated, or rejected as meaningless and unintelligible. A clause

or expression may be transposed if it is senseless and contradictory as it stands in a will, or if the transposition is necessary to give effect to an intention clearly expressed or indicated by the context: 1 Jarman on Wills, 499, 502. But here the clause or expression proposed to be transposed may be given meaning if read in its place as we find it in the will and is rendered meaningless if removed from that position, and the proposed transposition is not only not necessary to give effect to the intention which all agreed animated the testator, namely, to bequeath his personalty to his wife while she remained his widow, but will operate to defeat that intention. Transposition is only to be made when necessary to give effect to a meaning and purpose of the testator which is certain: Latham v. Latham, 30 Iowa, 294. Clearly, there is no warrant for removing the supposed parenthetical clause from the position given it in the will or for regarding it as a sentence complete within itself. It is inseparably ³⁸² connected with that which precedes it in the will. The words "give, devise, and bequeath," which precede the description of the real estate, refer to both real estate and personalty, as do also the words "whilst she remains my widow," which, as we construe the will, are the closing words of a single sentence in which the testator made known his wishes as to his property, both real and personal. If the word "thirdly" be omitted from the will, all ground on which to base the contention of appellant disappears. The rule is, the intent of the testator, if clearly disclosed by his will, must prevail, even if some words must be rejected to give effect to such intention: Huffman v. Young, 170 Ill. 290; Whitecomb v. Rodman, 156 Ill. 116, 47 Am. St. Rep. 181. In 2 Jarman on Wills, fifth American edition, page 53, it is said: "It is clear that words and passages in a will which are irreconcilable with the general context may be rejected, whatever may be the local position which they happen to occupy, for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein." The word "thirdly" was doubtless inserted from the prompting of some vague conception or idea of legal formalities. It has no meaning there, and serves no purpose in connection with the manifest intention of the testator. It may, therefore, be omitted from consideration in

arriving at the true construction of the will. Excluding the word, the devise and bequest of all the property, both real and personal, is expressed in a single sentence, and is to Mariah Church "whilst she remains the widow" of the testator. The estate thus created cannot be greater than an estate for life: *Willis v. Watson*, 4 Scam. 64; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102; *Kaufman v. Breckinridge*, 117 Ill. 305; *Siddons v. Cockrell*, 131 Ill. 653.

³⁸⁸ During the pendency of the cause in the circuit court, Henry Phelps, administrator with the will annexed of the estate of the said testator, by leave of the court filed an intervening petition, praying for a decree authorizing him, as such administrator, to make sale of the lands for the purpose of providing a fund wherewith to pay claims which, as the petition alleged, had been duly presented and allowed against said estate in the probate court, to discharge which there were no other assets, as the petition alleged. On a hearing the chancellor dismissed the petition. The administrator prayed and obtained an order granting him an appeal to this court, but failed to comply with the terms and conditions of such order. The administrator has assigned in this court alleged erroneous rulings of the chancellor with reference to the questions which arose in the trial court under his petition for a decree authorizing him to sell the land. That part of the decree dismissing the petition of the administrator had no relation to that other part of the decree construing the will of the deceased and declaring the rights and interests of the parties complainant and defendant to the bill for partition. The different parts of the decree were, in effect, distinct and separate decrees, and an appeal prosecuted from one part of the decree had no effect upon the decree in any other respect. The administrator failed to perfect his appeal from that portion of the decree which touched upon his rights and interests, and thereby is deemed to have acquiesced in the disposition of his petition. The appeal perfected to this court by the appellant only brings in review the action of the court on that branch of the case in which the administrator had no interest: 2 Ency. of Pl. & Pr. 96. He cannot, therefore, on this appeal assign as for error the rulings or findings of the court with relation to matters not involved in the appeal: *Walker v. Pritchard*, 121 Ill. 221; 2 Ency. of Pl. & Pr. 157.

The decree is affirmed.

WILLS—TRANSPOSING WORDS IN.—Repugnant words in a will which contravene the evident general purpose and intention of the testator as clearly expressed may be rejected or transposed: *Dickison v. Dickison*, 138 Ill. 541, 32 Am. St. Rep. 163; but a transposition of the language of a will can be justified only when it is necessary to give effect to the meaning and purpose of the testator: See the extended note to *Goode v. Goode*, 66 Am. Dec. 635.

WILLS—REJECTING WORDS IN.—The intent of a testator must govern in the construction of his will, although in giving effect to it some words must be rejected: *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181; monographic note to *Goode v. Goode*, 66 Am. Dec. 635.

ODIN COAL COMPANY v. DENMAN.

[185 ILLINOIS, 413.]

MINES AND MINING—WILLFUL OMISSION OF STATUTORY DUTY.—A mine owner is charged with knowledge of the provisions of the statute relating to the safety of miners, and his intentional and conscious omission of a statutory duty is a "willful" omission within the meaning of that word as used in the statute.

MINES AND MINING—NEGLIGENCE.—In an action to recover for the death of an employé caused by a mine owner's willful omission to furnish sufficient lights at the top of the shaft as required by statute, the contributory negligence of the deceased cannot be invoked as a defense.

MINES AND MINING — NEGLIGENCE — PROXIMATE CAUSE.—In an action by an employé to recover from a mine owner for injury caused by his "willful omission" of a statutory duty, not only must such willful omission be shown, but it must also be proved that was the proximate cause of the accident.

MINES AND MINING—WILLFUL OMISSION OF STATUTORY DUTY—EVIDENCE.—In an action to recover from a mine owner for his "willful omission" of a statutory duty, evidence of his intention to comply with the statute is inadmissible if the charge in the complaint does not involve evil or wrongful intent, but only conscious acts of omission, and not mere inadvertence.

L. M. Kagy and Van Hoorebeke & Loudon, for the appellant.

F. F. Noleman and W. F. Bundy, for the appellee.

414 **BOGGS, J.** Charles Denman, husband of appellee, an employé in the coal mine owned and operated by the appellant company, was killed by falling into the opening of the shaft at the surface of the ground and thence to the bottom of the mine. The appellee recovered judgment against the appellant company in the circuit court of Marion county in the sum of two thousand dollars on a declaration which, in the first count, charged the deceased came to his death by reason of the "will-

ful failure" of the appellant company to furnish a sufficient light at the top of the shaft of the mine, as required by section 6 of chapter 93, entitled "Miners" (Hurd's Stats. 1889, p. 929), and, in the fourth count, that the death of the decedent was occasioned by the "willful failure" of the appellant company to securely fence the top of the shaft by gates properly protecting the shaft, as is required by section 8 of the same chapter of the statute. The declaration contained other counts, but the verdict was rendered on the said first and fourth counts. The judgment was affirmed by the appellate court for the fourth district, and this is a further appeal perfected to this court.

Deceased was one of a force of men called the "night shift," employed by the appellant company to work in the mine during the night. When going down the shaft of the mine the night shift entered the cage at the opening of the shaft at the surface of the ground, and when coming out they left the cage at the same opening. The company did not maintain a light at this opening of the shaft. It had, however, directed an employé to carry a lantern when its employés, the night shift, were going into or coming out of the cage at this opening, and ⁴¹⁵ had arranged the windows of the engine-room, which was some fifty or sixty feet away, so that light from that room would shine in the direction of this opening of the shaft. A fence had been constructed around a lot or space some ten feet wide and twenty feet long, and the opening of the shaft was within this inclosure. This fence was not erected for the purposes of protecting the opening of the shaft or as being in compliance with the statute, but for the purpose of inclosing a lot for the storage of hay and feed intended to be lowered into the mine. The company had constructed above the surface of the opening of the shaft an uninclosed framework of timbers, which supported a structure called the "tipple house," some twenty feet above the ground. These timbers composing the framework on which the tipple house rested were supplied with "slides and guides" for the cages, and the cages and coal brought out of the mine through the shaft could be hoisted to the tipple house. The "day shift" of workmen were accustomed to enter and leave the cages at the tipple house. Coal brought out of the mine was hoisted to the tipple house and there distributed to the screens, cars, etc., but coal was not brought out of the mine except in the daytime. The appliances for raising and lowering the cages enabled the company to move the cages from the tipple house to the bottom of the shaft. On the occasion in ques-

tion the husband of appellee and the other workmen composing the night shift, after the hours of work for the night were over, were hoisted from the bottom of the shaft in a cage to the opening of the shaft at the surface of the ground. It was yet dark and there was no one there with a lantern. In endeavoring to alight, the husband of appellee fell into the shaft and was precipitated to the bottom of the mine, a distance of six hundred or seven hundred feet, and instantly killed. These are, in substance, the facts necessary to be known in order to determine whether the court erred ⁴¹⁶ in refusing the motion of the defendant company to direct a verdict in its favor.

The statute relied upon by the appellee are sections 6, 8, and 14 of chapter 93. These sections read as follows:

"Sec. 6. . . . A sufficient light shall be furnished at the top and bottom of the shaft to insure as far as possible the safety of persons getting on or off the cage."

"Sec. 8. . . . The top of each and every shaft and the entrance to each and every intermediate working vein shall be securely fenced by gates, properly protecting such shaft and the entrance thereto."

"Sec. 14. For any injury to person or property occasioned by any willful violations of this act or willful failure to comply with any of its provisions, a right of action shall accrue," etc.

The contention of the appellant company is: 1. That the top of the shaft of its mine is not the opening of the shaft at the surface of the ground, but that the landing at the tippie house, where the cages and the coal are hoisted, is the top of the shaft to which the provisions of the statute apply; and 2. That, even if the opening of the shaft at the surface of the ground should be deemed the top of the shaft, there is an entire absence of proof of willful failure to comply with the requirements of the statute; and 3. That the evidence did not tend to establish the proximate cause of the death of the deceased was the alleged omission of the company to comply with the requirements of the statute.

If the "top of the shaft" of a coal mine is not the opening of the shaft at the surface of the ground, it is for the reason the construction of the structure around about such opening of the shaft, and the manner and mode of operating, entering, and departing from the cages and delivery of coal from the shaft, have established the actual top of the shaft at some point above the surface of the ground. The most favorable view for the appellant company was that taken by the trial judge in ruling upon

⁴¹⁷ the motion and passing on the instructions given to the jury, that the top of the shaft in this instance was to be determined by the jury as a question of fact. The tendencies of the evidence on the point demanded the submission of the question to the jury.

The appellant company stood charged with knowledge of the provisions of the law and with the duty of complying therewith. In operating its mine it employed the landing of the shaft at the surface of the ground in such manner as to expose the deceased and his fellow-workmen to all the perils which induced the enactment of the statutory provisions here involved. It recognized the existence of such perils, but instead of complying with the law and employing the means enjoined upon it by the legislature to protect its employes against those dangers, substituted other methods—that is, it did not, in obedience to the statute, have the landing which it devoted to the uses of the “top of a shaft” furnished with a “sufficient light” to enable workmen to alight from the cage in the night-time, but substituted the plan of ordering one of its servants to go to the landing with a lantern when the cages brought workmen from the mine to the surface of the ground. The omission was not through mere inadvertence, but was intentional. There was no evil intent operating to induce the failure, but that element is not a necessary ingredient of willfulness, within the correct meaning of the word “willful” as employed in this statute. As used in criminal and penal statutes, the word “willful” has frequently been interpreted to mean, not merely a voluntary act but an act committed with evil intent, etc. The statute here involved is not a penal statute. The recovery awarded is not a penalty in the nature of a fine or a forfeiture, nor is it awarded as a punishment, but is confined, by the express terms of section 14 of said chapter 93, to “the direct damages sustained” by reason of the omission or failure of which complaint is made. Compensation for injuries inflicted—⁴¹⁸ not punishment—is the ground of recovery. “‘Willful’ is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing, and is a free agent”: 29 Am. & Eng. Ency. of

Law, 113. An act consciously omitted is willfully omitted, in the meaning of the word "willful," as used in these enactments of our legislature relative to the duty of mine owners. In *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 502, we said: "Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein."

It is true it is not sufficient, to maintain an action of this character, to establish merely a willful omission of statutory duty. It is necessary the injury complained of shall have resulted from the omission—that the omission was the proximate cause of the injury. The testimony tended to show the occupants of the cage intended to leave the cage at the opening of the shaft at the surface of the ground, and that the deceased supposed the position of the cage was such he could step from the cage to the ground. The evidence tended to show the cage had passed above the level of the ground when the deceased sought to alight, and he did not gain secure footing on the ground and fell into the shaft. The servant of the company who, it is insisted, was charged with the duty of bringing a lantern to enable the occupants to alight with safety was not there. It was yet dark. There was no light there. There was a light in the engine-room, ⁴¹⁹ some fifty or sixty feet away, or is most probable there was, but the landing and mouth of the shaft were enveloped in darkness. Certainly, there is no room for the contention the tendencies of the evidence were insufficient to warrant the submission to the jury of the question whether the proximate cause of the death of the deceased was the absence of a "sufficient light," to adopt the words of the statute with reference to the duty of the mine owner to supply a light at the top of the shaft of a mine. Even if the true or more immediate cause of the injury was the act of the deceased in stepping from the car after it had passed the landing, still the existing condition of darkness may have been the proximate cause of the injury: 5 Am. & Eng. Ency. of Law, 11. In this connection it must also be borne in mind the doctrine of contributory negligence cannot be invoked by the appellant company: *Carterville Coal Co. v. Abbott*, 181 Ill. 495.

The motion to exclude the evidence and direct a verdict for the company was properly denied.

It was not error to refuse to allow the president and superintendent of the appellant company to testify that they in good

faith intended to comply with the provisions of the statute. The averments of the declaration the omission to observe the requirements of the statute were willful did not, as we have seen, involve a charge of evil or wrongful intent, but only that the omissions were conscious acts of the mind and were not from mere inadvertence. In criminal proceedings, where it is designed to punish the defendant, and in that class of civil cases where a penalty is provided the amount whereof is fixed by statute as in the nature of punishment, or in those cases where, in addition to damages recoverable as indemnity to the plaintiff for the injury sustained, exemplary or vindictive damages may be assessed as punishment of the defendant, the intent of the defendant becomes material. In all cases in those classes the word "willful" is interpreted to include malice, evil intention ⁴²⁰ or other wrongful motive. In the case at bar, the recovery is limited to actual or direct damages, and the amount to be recovered is not to be mitigated or aggravated by the presence or absence of the element of fraud, malice or evil intent. The word "willful," employed in pleadings in proceedings of this character, does not import any blameworthy motive and no issue of intent arises.

We need not notice in detail other objections preferred to the action of the court in admitting or excluding testimony and in granting or refusing instructions. They involve only the principles of law already herein discussed.

The judgment is affirmed.

NEGLIGENCE—PROXIMATE CAUSE.—If a breach of a statutory duty is relied upon by a plaintiff as a cause of action, he must show that such breach was the proximate cause of the injury complained of: See the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 817.

NEGLIGENCE, CONTRIBUTORY—WHEN NOT A DEFENSE. If a defendant's acts are willful and intentional, the plaintiff's negligence is no longer deemed in law the proximate cause of the injury: *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 70 Am. St. Rep. 341.

THOMPSON COMPANY v. WHITEHED.

[185 ILLINOIS, 454.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—PRESUMPTION.—The right to make a voluntary assignment for the benefit of creditors exists at common law, and is presumed to exist in each of the states of the American Union.

ASSIGNMENT FOR CREDITORS—CONFLICT OF LAWS. A voluntary common-law assignment for the benefit of creditors, if valid where made, is valid in another state as against a creditor nonresident of the latter state who has levied an attachment on property in the possession of the assignee under the authority of such assignment.

ASSIGNMENT FOR CREDITORS—FOREIGN CORPORATION—DOMESTIC CREDITORS.—A foreign corporation which has failed to obtain a certificate authorizing it to do business in the state as required by statute at the time of the levy of an attachment by it on property in that state, but then in the possession of a foreign assignee for the benefit of creditors, cannot be regarded as a domestic creditor, and does not acquire any rights by virtue of its levy.

L. J. Pierson, for the appellant.

Allen, Latham & Young, for the appellee.

459 **BOGGS, J.** The appellant company urges the chancellor erred in admitting in evidence, over its objections, proof of the enactments of the general assembly of the state of North Dakota in relation to trusts and assignments. The appellant here was successful in the trial below and was appellee in the appellate court. It did not assign cross-errors on the record in the appellate court, and cannot be allowed to assign as for error in this court any ruling of the chancellor to which it made no objection in the appellate court: *Newell v. Sass*, 142 Ill. 104.

It was clearly proven the appellee assignee secured the possession of the goods in controversy and placed them in storage with the said Morgan Storage and Warehouse Company. This is not controverted. But appellant contends it was established by certain letters written by the appellee assignee to the storage company that said appellee abandoned all right or claim of possession or dominion over the goods, and did not claim the goods were in his possession at the time it caused the attachment writ to be levied. We have examined these letters and considered the statements therein contained, together with certain telegrams and other facts and circumstances disclosed by the evidence bearing on the point. These letters and telegrams were addressed to the Morgan Storage and Warehouse Com-

pany, and, with the exception of one of the letters, related solely to a ⁴⁶⁰ controversy between the appellee, as assignee, and the said Cushman Brothers & Co., who had asserted and were asserting a right to the possession of the goods as consignees, and had no reference whatever to any claim of the appellant company. The letter written after the levy of the attachment was written in reply to notice given by the storage company that an attachment had been levied on the goods. The statements contained therein are, in substance, that the appellee's view is he should not defend the attachment suit but should require the storage company to pay him for the goods, but that he will refer the whole matter to his attorney. It does not appear the appellant company had any knowledge of any of these letters or telegrams when the attachment suit was brought or that its course was in any manner affected or controlled by them. It appeared from the proof on the point the appellee assignee at all times claimed the ownership of the goods and the right to the possession thereof, and his intention to invoke all necessary legal remedies to protect his possession, or to recover the value of the goods if deprived of their possession. We think it clearly appeared from the proofs the possession of the goods by the storage company at the time the attachment writ was issued was the possession of the appellee assignee.

The question for decision then is, Did the appellant company, a corporation organized under the laws of the state of New Jersey, by means of the attachment writ issued under the laws of this state, and the levy thereof on the goods in this state in the possession of the appellee as assignee, he being a resident of the state of North Dakota, obtain a lien on the goods superior to the right of the appellee as such assignee?

The appellant insists it appears from the enactments of the law-making power of the state of North Dakota offered in evidence common-law or voluntary assignments for the benefit of creditors are not permitted, but that ⁴⁶¹ debtors desiring to make assignments for the benefit of creditors do so under the provisions of the code adopted by that state, governing, as appellant contends, the entire question of such assignments. The North Dakota code to which appellant refers applies only to a debtor whose aggregate indebtedness amounts to five hundred dollars, and who takes advantage of the act for the "purpose of obtaining a discharge from his debts." It is in the nature of a bankruptcy act, having the effect to relieve the debtor of further liability to respond to his creditors, and is

not available to debtors who do not owe at least five hundred dollars in the aggregate. The assignment is not made by the debtor, but by the clerk of the court to an assignee selected by the creditors. The filing of the petition in the district court is apparently the only voluntary act required of the debtor. Such a proceeding is a statutory one as distinguished from a voluntary assignment. We do not regard this enactment as affecting the right of a debtor resident in North Dakota to execute a common-law deed of assignment for the benefit of his creditors, leaving him still liable to answer all demands not discharged in full out of the assigned estate. That code has no reference to a debtor who owes less than five hundred dollars, nor to any debtor other than those who voluntarily invoke it in order to be discharged as to all their debts. We would not impute to the state of North Dakota the intention to require a debtor residing in that state to apply, under that statute, to be relieved from any and all obligations to his creditors, and to deny to such debtor the common-law right to convey his property to an assignee for the benefit of his creditors, he also remaining liable to them. It was not proven common-law assignments are expressly prohibited by the laws of North Dakota. This code does not prohibit such assignments directly or by implication. The right to make an assignment existed at the common law, and is to be regarded as existing in each of the states of the Union unless shown to have been changed ⁴⁶² or abrogated by statute. The deed of assignment in question conveyed all the property of the debtor for the benefit of all of his creditors, without distinction or preference. In that respect it is not antagonistic to the policy of our laws. Our statute respecting voluntary assignments does not create the right to make such an assignment, but only places restrictions on the exercise of the common-law right possessed by the debtor to so dispose of his property: *Hanchett v. Waterbury*, 115 Ill. 220; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Howe v. Warren*, 154 Ill. 227. The assignment to the appellee was not a statutory one, but a voluntary common-law assignment on the part of the debtor. It was valid by the *lex loci*, and will be carried into effect here as against a creditor nonresident of this state who has levied a writ of attachment on property in the possession of the assignee under the authority of such assignment. *Heyer v. Alexander*, 108 Ill. 385, *May v. First Nat. Bank*, 122 Ill. 551, and *Townsend v. Coxe*, 151 Ill. 62, discuss the doctrine here involved and in principle support the conclu-

sion here announced: See, also, 3 Am. & Eng. Ency. of Law, 571, 572.

Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691, did not involve the question here presented. In that case a firm resident in Illinois was indebted to one Landenberger, a resident of the state of Pennsylvania. An attachment writ was issued in this state at the instance of a foreign creditor of Landenberger, and the Illinois debtor firm was garnished and made answer admitting the indebtedness. Trustees appointed under the provisions of the statutes of Pennsylvania, with authority to receive the property of Landenberger and administer the same for the benefit of his creditors, interpleaded. It was held the fund was in Illinois and was subject to the remedies provided by our laws for the collection of debts by the process of garnishment, and that the attaching creditor secured prior right thereto. In the case at bar, the subject matter of the litigation is personal property which the foreign ⁴⁶³ assignee had reduced to possession. Having possession, his right would be superior to that of a foreign creditor seeking to dispute such possession by the medium of the process of attachment.

It is urged the policy of our law does not permit the withdrawal of funds or property by a foreign assignee while the demands of creditors resident in the state remain unpaid, and it is insisted the appellant company is to be regarded as a domestic creditor and entitled to the benefit of the operation of this rule, and for that reason its lien should be regarded as superior to the right of the appellee assignee to the goods. It appeared the appellant company is a corporation organized under the laws of the state of New Jersey for the purposes of profit and gain; that at the time of the institution of the attachment suit, and for some four or five years previous thereto, it had maintained a branch office in this state and transacted its business here; that the indebtedness sought to be recovered by the process of attachment grew out of contracts for advertising entered into with the insolvent North Dakota corporation in the state of Illinois in the year 1896 and up to April, 1897. On the twenty-sixth day of May, 1897, an act of the general assembly of the state of Illinois (Laws 1897, p. 174), being an act to require every foreign corporation doing business in this state to have a public office or place where it transacted its business, and to file its articles of incorporation with the secretary of state, etc., was approved. The act went into effect July 1, 1897. By section 1 of the act the appellant company was required, "before

it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation." ⁴⁶⁴ By section 2 of the act it was required to "file in the office of the secretary of state a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal or agent in Illinois of the said corporation shall make and forward to the secretary of state, with the articles or certificates above provided for, a statement duly sworn to of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the state of Illinois; and such corporation shall be required to pay into the office of the secretary of state of this state, upon the proportion of its capital stock represented by its property and business in Illinois, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state. Upon a compliance with the above provisions by said corporation, the secretary of state shall give a certificate that said corporation has duly complied with the laws of this state and is authorized to do business therein." Section 3 of the act, after providing for the imposition of a fine for the failure to comply with the provisions of sections 1 and 2, is as follows: "In addition to which penalty on and after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort."

The attachment suit was instituted on the twenty-ninth day of July, 1897, and the levy was made on that day. The appellant company had not complied with the requirements of the act before mentioned. The provisions of that portion of section 3 of said act hereinbefore mentioned declared the appellant company should not, in ⁴⁶⁵ consequence of such noncompliance, be permitted to maintain any suit or action, legal or equitable, in any of the courts of the state on any demand, whether arising out of contract or tort. No reason is perceived why the provisions of this act should not have full operation. Given

such operation, the appellant company had no standing in the courts of Illinois to enforce a demand, and the insistence it was entitled to the privileges accorded by the policy of our law to a domestic or resident creditor is wholly untenable. It had no right to invoke action of any kind, under the laws of this state, in aid of the enforcement of any contract or the collection of any debt. It was proven the appellant company applied to the secretary of state on the nineteenth day of August, 1897—which was previous to the hearing of this cause—for a certificate of compliance with the provisions of the enactment under consideration, but did not complete its application to the satisfaction of the secretary of state until September 11, 1897, upon which date it received its certificate. But its rights are to be determined (at the latest) as of the date of the levy of the writ. If it did not secure a lien upon the property in dispute by the levy of the writ of attachment it was powerless to interfere with the possession and control of the goods by the assignee. It had not then complied with the conditions fixed by the statute as a prerequisite to its right to invoke the aid of the courts of this state, and the right of the appellee assignee to retain the possession of the goods was superior to any right which could be obtained by the appellant company by virtue of the writ issued in a suit which it had no legal standing to institute.

The judgment is affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary assignment by a debtor of all his property for the benefit of his creditors, valid by the law of his domicile, will prevail against the lien of an attachment subsequently issued in another state or country in favor of a creditor there, whether citizen or nonresident, upon a debt of the original assignor embraced in the assignment: *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545.

CORPORATIONS, FOREIGN — NONCOMPLIANCE WITH STATUTE.—That a corporation cannot maintain an action in a foreign state without having complied with its statutory requirements, see *Rose v. Kimberly*, 89 Wis. 544, 46 Am. St. Rep. 855; *Swing v. Munson*, 141 Pa. St. 582, 71 Am. St. Rep. 772.

SPRINGER v. LAW.

[185 ILLINOIS, 542.]

JUDICIAL SALES.—WANT OF NOTICE to the mortgagor of a foreclosure sale, and the fact that the property was sold for an inadequate price, are not grounds for setting aside the sale and confirmation thereof made in chancery, for the reason that the mortgagor's right of redemption gives him the same benefit as if he had been present at the sale and bid in the property at full value.

JUDICIAL SALES.—WANT OF NOTICE.—A statute relating to judgments and executions and requiring written or printed notices of an execution sale to be posted, does not apply to a sale in chancery, for the reason that chancery may provide for notice without complying with such conditions, provided the notice given is reasonable.

JUDICIAL SALES.—PUBLISHED NOTICE of a foreclosure sale made in chancery is sufficient if it gives the title of the cause and the date of the decree, and states that the sale is made in pursuance of such decree showing the amount due.

MORTGAGES — FORECLOSURE — DEFICIENCY — DECREE.—A personal deficiency decree may be rendered conditionally at the time that the decree of foreclosure is rendered, or absolutely after sale and ascertainment of the balance due.

W. N. Gemmill, for the appellant.

Quigg & Bentley, for the appellees.

543 **CARTWRIGHT, C. J.** Appellant filed objections to a master's report of a sale made February 4, 1898, by virtue of a decree foreclosing a trust deed made by appellant and his wife. The objections were overruled and the sale confirmed, and a personal decree against appellant for a deficiency was entered. The appellate court affirmed the order and decree.

The first objection to the sale was that no notice thereof had been given to or received by appellant, so that he had no opportunity to be present and bid on the premises or secure some person to bid. There was no provision of the decree requiring such personal notice, and there is no requirement of that kind in the law. Appellant, however, claimed that there was an understanding that he should have such notice, and filed the **544** affidavit of his solicitor that he was led by the master to believe that such notice would be given, and also affidavits of the appellant and others that the property was worth more than the amount for which it was sold. The affidavit of the solicitor did not show what statement or conduct of the master led him to such a belief, and was too indefinite to establish a promise on the part of the master or a reasonable belief induced by

anything that the master did or said. The mere inadequacy of price shown by the other affidavits was not sufficient to refuse confirmation of the sale, since appellant had a right of redemption and could have the same benefit by the redemption of the property as if it had sold for its full value. For the same reason he suffered no injury through want of personal notice. He knew of the sale February 7, 1898—three days after it was made. He could then redeem and realize the full value of the property. On that day the master told appellant's solicitor that it was his universal practice to send notice of sales to the parties, but that his clerk made a mistake in this case. If he had attended the sale and could have bid, as he insists he wanted to, he would have had to pay more for the property than what it was sold for, and pay it in cash. We cannot see that he was harmed in any way by want of personal notice or inadequacy of price.

The decree required the notice of sale to be published in a newspaper for three successive weeks, once in each week, and it was so published, the first publication being more than three weeks prior to the day fixed for the sale, but the appellant objected to the sale as illegal because written or printed notices were not posted as provided for in section 14 of chapter 77 of the Revised Statutes, and also because the notice did not state the amount of indebtedness to be realized from the sale. In *Crosby v. Kiest*, 135 Ill. 458, it was decided that the statute referred to does not apply to a sale under a decree by a master. The practice of giving notice equal to what the legislature ⁵⁻⁴⁵ has deemed necessary in sales on execution was recommended, but the power of a court of chancery to prescribe notice without complying with such conditions was recognized, provided the notice is reasonable. In that case it was thought that such a notice as this was not unreasonable. It was therefore sufficient. The notice gave the title of the cause and the date of the decree, which showed the amount of the indebtedness, and stated that the sale would be made in pursuance of that decree. All the necessary information on that point was furnished by the notice, and we regard it as sufficient without specifying the amount to be made by the sale.

The sale was made for thirty-three thousand dollars, and after applying the proceeds there was a deficiency of three thousand eight hundred and seventy-seven dollars reported by the master. For this amount the court entered a personal decree against appellant. It is not contended that he was not liable

personally for the debt, but the personal decree is objected to because the original decree did not provide for such personal liability or personal decree in case of a deficiency. Section 16 of chapter 95 of the Revised Statutes provides that such a decree may either be rendered conditionally at the time of decreeing the foreclosure, or absolutely after the sale and ascertainment of the balance due. The method adopted here is expressly authorized by the statute. If the decree for the deficiency had been provided for in the decree foreclosing the mortgage it would have amounted to nothing more than a formal finding that the complainant would be entitled to a decree in the event that the property should not sell for sufficient to pay the debt.

The judgment of the appellate court is affirmed.

MORTGAGE—NOTICE OF FORECLOSURE SALE.—In the absence of an agreement to the contrary, one interested in land sold under a mortgage with a power of sale is entitled only to the usual published notice: *Dyer v. Shurtleff*, 112 Mass. 165, 17 Am. Rep. 77. See the notes to *Hoffman v. Anthony*, 75 Am. Dec. 704-713; *Maddox v. Sullivan*, 44 Am. Dec. 238-240, for extended discussions of the necessity and sufficiency of notice of judicial sales.

ELDREDGE v. PALMER.

[185 ILLINOIS, 618.]

INSANITY—DEED OF INSANE PERSON—CANCELLATION—RESTORATION OF CONSIDERATION.—A deed executed by a person without legal capacity for whom a conservator is afterward appointed cannot be set aside without restoration of the purchase money paid by the grantee, or property parted with, if such grantee had no notice or knowledge of the grantor's infirmity, or of any undue influence by the party to whom he has conveyed the property. In such case, inadequacy of price may justify setting aside the conveyance, but not without a return of the money paid or property conveyed in consideration therefor.

H. S. Tanner, J. W. Howell, and J. A. Eads, for the appellant.

J. E. Dyas, for the appellee.

618 CARTWRIGHT, J. On December 27, 1897, James Elledge executed a deed to appellee John C. Palmer of a lot, with a brick residence thereon, on North Central avenue, in Paris, Edgar county, and in payment therefor Palmer gave

Elledge one thousand dollars, and by his direction conveyed to Jane O'Hair a house and lot on Jefferson avenue, in said city. A year afterward, on December 19, 1898, the appellant, Otis Eldredge, was appointed conservator for Elledge, and thereafter filed his bill in equity in this case to set aside the deed so executed to Palmer, charging that Elledge was in his dotage and of unsound mind and memory; that he executed the deed under undue influence of Jane O'Hair, and that the consideration paid was inadequate. The bill also stated that Jane O'Hair claimed that Elledge had ⁶¹⁹ previously conveyed to her a life estate in the property deeded to Palmer, and complainant denied that any such deed was made, but alleged that if it was made it was procured by undue influence of said Jane O'Hair. Palmer answered admitting the conveyances as alleged, but denying that Elledge was of unsound mind or memory, or that said defendant had any knowledge or information of the alleged incompetency or of any undue influence exercised by said Jane O'Hair, and alleging that he paid a fair and adequate consideration for the property. Jane O'Hair answered, also admitting the conveyances, and denying that Elledge was of unsound mind or that she exercised any undue influence over him. She averred that she owned a life estate in the property conveyed by Elledge to Palmer, for which she received the house and lot conveyed to her, and stated that she had conveyed the property she had received to one Swango.

The court made up and submitted to a jury three issues of fact, and upon such issues the jury returned a verdict that the deed to Palmer was not the deed of Elledge; that at the time of executing the same, Elledge was not of sound mind and memory or of sufficient mental capacity to execute and deliver deeds, and that he was unduly influenced by Jane O'Hair to execute said deed. Afterward, further evidence was taken as to the rental of the pieces of property, repairs, taxes, and insurance, and the court entered a decree charging the defendant Palmer with three hundred dollars rents and crediting him with eighty-eight dollars and fifteen cents for taxes, repairs, and insurance; finding the property conveyed to Jane O'Hair worth nine hundred dollars, and the rent of the same one hundred and forty dollars, and interest on the one thousand dollars cash paid by Palmer eighty-three dollars and thirty-two cents. The decree provided that the complainant should, within ninety days, pay to Palmer one thousand and eleven dollars and forty-seven cents, and deliver to Palmer a deed conveying to him the

property deeded by him to Jane O'Hair, or, in the alternative, should pay Palmer nineteen hundred and eleven dollars and forty-seven cents, and thereupon Palmer should hold the property in trust for Elledge, but in default of complainant performing ⁶²⁰ either of said conditions the title of Palmer to the property should be absolute. This appeal is by the conservator, who claims that the property should be returned without terms, and that, in any event, he should not be required to restore what was deeded to Jane O'Hair, or the value thereof. The only question involved is whether the conveyance from Elledge to Palmer should be set aside without requiring the consideration to be returned.

Elledge had not been declared incompetent, but was transacting his own business and managing his own affairs, and continued to do so for a year after the transaction, and the rule is, that if Palmer entered into the contract without knowledge or notice of any disability on the part of Elledge or undue influence of Jane O'Hair, in good faith and for a sufficient consideration, the conveyance should not be set aside without restoring the money paid and the property parted with: *Scanlan v. Cobb*, 85 Ill. 296; *Ronan v. Bluhm*, 173 Ill. 277.

The evidence was that James Elledge was about seventy-two years old. He was a widower, whose wife had been dead about eighteen years. He owned two hundred acres of land where he lived, which he rented out. Part of the time after the death of his wife, he and his married son, Vane Elledge, lived together on the farm, and after his son's death he continued to live there with his son's widow, Lizzie Elledge, and one year during that time he lived in Paris with her father and stepmother, John W. and Jane O'Hair. The defendant Jane O'Hair had great influence over him and was at the farm frequently, and he was continually doing something for the O'Hair family. He bought a buggy for her, and her husband got wood and supplies from the farm, and the next day after the transaction with Palmer he paid Palmer two hundred and twenty-five dollars on a note and mortgage on land belonging to Jane O'Hair. He made a deed to her of some interest in the property conveyed to Palmer, but it was not recorded and was lost or destroyed. ⁶²¹ and at the time of the conveyance in question Jane O'Hair and her husband also made a conveyance of the property to Palmer. In December, 1897, when the deed was made to Palmer, Elledge had become very forgetful and manifested the weakness and feebleness of age, both in

mind and body. He walked with much difficulty, with very short steps and a shuffling gait. He had been growing weaker, mentally and physically, with the advance of age, for two or three years. There were many witnesses who testified that they did not consider him capable of doing ordinary business. On the other hand, he attended to all his business and affairs, and a considerable number of witnesses regarded him as capable of transacting business. Among these witnesses were officers of banks and merchants with whom he did business and had done business for years, and they saw nothing in his talk or actions to show a want of capacity. The complainant, his conservator, who knew him very well and saw him often at church and elsewhere, was not able to say he was unfit to transact business at that time, and first noticed something wrong with his mental condition about the time he was appointed conservator. Elledge conducted the negotiations with Palmer for the exchange, and there was nothing which occurred at that time indicating incapacity. Mrs. O'Hair came to Palmer's office with him and was there most of the time, but he acted independently, and there was no influence or persuasion on her part in the presence of Palmer.

It must be taken that Elledge was incapable of transacting business, but the evidence does not justify an inference that Palmer knew of such incapacity or of any circumstances which would lead to that conclusion, or any undue influence on the part of Jane O'Hair. Elledge had children and grandchildren near him who made no move to have a conservator appointed, and apparently did not consider it necessary for a year after this transaction, and during that time the property conveyed to ⁶²² Jane O'Hair was transferred so that it could not be reached. Manifestly, the undue influence of Jane O'Hair was exerted to procure the conveyance to her and for her own benefit. So far as appears, she was not concerned except in obtaining the house and lot on Jefferson avenue for herself, and if that conveyance was secured without consideration, through undue influence, it might have been set aside.

So far as Palmer was concerned, there was no dependent or confidential relation between him and Elledge and no misrepresentation or imposition. On the question of setting aside the deed without restoring the consideration, the only argument that can be made is that the consideration paid by Palmer was inadequate. There was a great variety of opinion among the witnesses as to the value of the respective pieces of property,

but there is no doubt that the exchange was quite an advantageous one for Palmer. Considering all the evidence, the advantage to him in the exchange was probably five hundred dollars to one thousand dollars, but we are inclined to the view that the consideration was not so grossly inadequate as to afford evidence of wrongdoing or bad faith on the part of Palmer, so as to justify depriving him of the consideration. So far as he knew, Elledge was entirely competent to deal independently and to agree upon the consideration for his property. It is conceded that the inadequacy of consideration, in combination with all the other circumstances, justified the court in setting aside the conveyance, but we cannot say that the court was in error in requiring the money paid and the property conveyed, or the value thereof, to be restored.

The decree of the circuit court is affirmed.

INSANE PERSONS.—A DEED of a person of unsound mind, made before office found, to one who has no knowledge of the grantor's incapacity, is voidable only, and in order to avoid it, the consideration received must be tendered to the grantee: See the monographic note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 431, 432.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

CHURCHILL v. WHITE.

[58 NEBRASKA, 22.]

INFANTS—CONTRACT AND TORT LIABILITY.—Ordinarily, an infant is not liable on his contracts, except for necessities, but he is liable for his torts, notwithstanding they may have arisen out of, or in some way may have been connected with, a contract.

INFANTS—LIABILITY FOR TORT.—An infant who hires a team to go to a designated place, but departs from his contract and drives to a different place and in another direction, and injures the team and carriage, is liable therefor.

EVIDENCE—ADMISSIONS—IMPEACHING WITNESS.—The admissions or statements of a party to a suit against his interest, made out of court or upon a former trial relating to a material matter, may be proved without laying the foundation required in impeaching a disinterested witness.

APPEAL—REVIEW OF EVIDENCE.—Errors must be specifically assigned in a petition in error or they will be disregarded.

Thomas H. Matters, for the plaintiff in error.

William M. Clark, for the defendant in error.

22 NORVAL, J. This was an action by George M. White against Howard Churchill to recover damages to plaintiff's buggy, alleged to have been caused by the wrongful act of the defendant. From a judgment for sixty dollars entered on a verdict for plaintiff the defendant has prosecuted this error proceeding.

The first assignment of error challenges the sufficiency of the petition filed in the court below, and upon which the cause was

tried. Plaintiff for a cause of action alleges, in substance and effect, that plaintiff is engaged in the livery business at Clay Center, furnishing horses, harness, buggies, etc., for hire to those who may desire the same; that the defendant is a minor of the age of nineteen years, residing with his father near the town; that ²³ on October 23, 1894, defendant hired from plaintiff a livery rig, consisting of a span of horses, a set of harness, and a two-seated covered buggy, to go four or five miles immediately south of Clay Center to a dance at the residence of one A. R. Baker, and agreed to and did pay plaintiff as use for said team, harness, and buggy the sum of one dollar and fifty cents; that defendant, after obtaining possession of said rig, drove the same to the town of Harvard, situate two and one-half miles west and six and one-half miles north of Clay Center, thence, after obtaining or receiving other passengers, he drove to said Baker's residence, where he remained a few minutes and drove the rig with five passengers directly west two and three-fourths miles, thence north eleven and one-half miles to Harvard, and thence to Clay Center; that the defendant, while said rig was in his possession, and being driven out of the line of the route from Clay Center to the place of the dance, and on the return trip from Baker's to the town of Harvard, permitted the buggy to upset, and the team to run several rods, thereby breaking the buggy in numerous places, described with great particularity in the petition, cutting and bruising the heel of one of the horses; that the team was overdriven, and that defendant drove the rig in a direction, and used the same for a purpose, different than that for which it was hired; by reason whereof plaintiff has been damaged in the sum of one hundred dollars.

The contention of defendant below, plaintiff herein, is that the action is founded upon a contract with an infant, and, therefore, no recovery against him can be had. While ordinarily infants are not liable on their contracts, except for necessities, they are answerable for their torts. In 10 American and English Encyclopedia of Law, 668, 669, the rule is stated thus: "An infant is liable for all injuries to property or person wrongfully committed by him. His privilege of infancy is given to him as a shield and not as a sword, and it cannot be used for protection against the consequences of wrongful acts; for, where civil injuries are ²⁴ committed by force, the intent of the perpetrator is not regarded. . . . Although an infant is liable for his torts, he is not liable for the tortious consequences of his

breach of contract. Whether the form of the action be contract or tort, the infant cannot be held for a mere violation of contract, but the contract cannot avail if the infant goes beyond the scope of it. The tort must be a distinct and substantive wrong in itself, even though it grow out of a contract, to make the infant liable. The contract must be generally put in proof to support the action, but that is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract and not because the contract is otherwise involved." The text is abundantly sustained by judicial decisions. Although no recovery can be had against an infant for a breach of contract, the principle is well recognized, and has been often applied, that he is liable for a tort committed by him, notwithstanding it may have arisen out of, or in some way may have been connected with, a contract.

In *Fitts v. Hall*, 9 N. H. 441, *Parker, C. J.*, observed: "The principle to be deduced from these authorities seems to be that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But, if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable."

In *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340, it was held that where an infant hires a horse and buggy of a keeper of a livery-stable to go to a designated place, and drives beyond the place or in another direction and injures the horse, the infant is liable therefor. To the same effect are *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136, 22 Am. Dec. 414; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Fish v. Ferris*, 3 E. D. Smith, 565.

²⁵ In *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85, an infant who hired a horse to drive to an agreed place twenty-three miles distant, returned by a circuitous route which nearly doubled the distance, and stopped at a house on the way, leaving the horse standing out of doors during the night without food, and it died from overdriving and exposure. It was decided that the infant was liable in damages, by reason of his having departed from the object of his bailment. *Redfield, J.*, in delivering the unanimous opinion of the court, said: "So long as the

defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose and puts him to another, as he does when he takes another's property by way of trespass." This case was cited by the same court, and the principle applied, in *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189, was an action against an infant to recover damages for having so carelessly and immoderately driven plaintiff's horse, which he had hired, as to cause the animal's death. The plea was infancy. *Bel- lows*, C. J., in passing upon the question, employed the language following: "We think, then, that the doctrine is well established, that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract, as by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, willfully beating him to death, and the like; so, if he willfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. . . . In all these cases it may be urged that the law implies a promise on the part of the ²⁶ bailee to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately, and that a failure in either respect is merely a breach of contract. So, it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him willfully would be a positive act of trespass, for which an infant should be liable the same as if there were no contract. . . . When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails, from want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. . . . But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no

bailment, even if assumpsit might be maintained in case of an adult, on a promise to return the thing safely." In the case in hand the petition discloses, and the evidence adduced by plaintiff on the trial tends strongly to establish, that the tort of the defendant was not committed under the contract, but by absolutely abandoning or disregarding it, or in departing from the terms thereof. The petition is not framed upon the theory of a breach of contract, but for the tort, and contains sufficient averments to constitute a cause of action, notwithstanding the infancy of the defendant.

The seventh instruction is criticised, which reads as follows: "You are instructed, gentlemen, that, so far as this case is concerned, the infancy of the defendant does not affect the liability. The rule that one who hires property of this kind for one purpose and uses it for another or different purpose from that contemplated by the parties in the contract of hiring is liable for any harm that may happen it while he is so using it, applies to minors as well as to adults." This instruction harmonizes with ²⁷ the views which we have already expressed and is within the doctrine announced in the cases cited above. This portion of the charge did not withdraw from the consideration of the jury whether or not the defendant used the team and buggy for a purpose different from that contemplated by the contract of hiring. Such question was fairly submitted to the jury by other instructions, which expressly advised the jury there could be no recovery if the defendant did not hire the property for a specific and designated trip, or route of travel, or to drive to a specific place. Under the theory of neither party was the infancy of the defendant material, or an important consideration, since it could not influence the decision either way. If the team was hired to drive to Mr. Baker's, as plaintiff insisted was the agreement of the parties, then it was driven nearly fifty miles, instead of ten miles, the distance from Clay Center to Baker's and return by the usual route of travel.

It is insisted that error was committed in admitting the testimony of J. M. Lyons, George Nye, Robert Stewart, Thomas Stewart, George M. White, and Snyder White. The defendant on the trial testified that there was no agreement when the team was hired that it was to be driven from Clay Center to Baker's to a dance. The testimony of the persons named above was to the effect that the defendant, when a witness for himself before H. C. Palmer, a jus-

tice of the peace of Clay county, in a criminal prosecution against said Churchill, stated he hired the team and buggy to go to Baker's, four or five miles south of the place of hiring. It is urged that the testimony of said witnesses was impeaching in its character, and was improperly admitted, because no legal foundation therefor had been laid. In the case in hand the following question was propounded to the defendant on cross-examination by counsel for plaintiff: "I will ask you to state if you did not swear in the lower court, before H. C. Palmer, justice of the peace in the town of Sutton, Nebraska, on the eighth day of December, 1894, in ²⁸ the case wherein the state of Nebraska was plaintiff and Howard Churchill was defendant, that you hired the team and buggy to go south of Clay Center four or five miles to Baker's to a dance." The answer made to this question was, "No, sir; I did not." It was subsequent to the propounding of said interrogatory, and the taking of the answer thereto, that the admissions or statements of the defendants were proven. It is not necessary to decide whether the foundation attempted to be laid would have been sufficient to admit impeaching testimony had Churchill been merely a disinterested witness and not a party to the present litigation, since the testimony was competent as an admission against the interest of a party to the record. It is true one of the modes of impeaching a witness is by showing that he has made statements out of court at variance with his testimony, and that the same rule may be applied to a party to the action, but it is equally well settled that the admissions or statements of a litigant against interest, made out of court or upon a former trial relating to a material matter, may be proved without laying the foundation required in impeaching a disinterested witness: *Bartlett v. Cheesebrough*, 32 Neb. 341; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 678. There is no error in admitting the testimony to which objection has been interposed.

In the brief of defendant below complaint is made of the receipt as evidence of plaintiff's exhibit 1 and testimony offered by the same party relative to the measure of damages "found on pages 6, 7, 16, 26, 36, 38, 50, 56, and 59 of the bill of exceptions." The second assignment of the petition in error states: "The court erred in admitting all evidence on the part of the plaintiff over the objection of the defendant, to which exceptions were there and then duly taken." There is no other assignment in the petition in error which in any manner attempts to present the rulings of the court on the admission of

evidence, and the assignment quoted is entirely too general and indefinite to make available on review the decision of the ²⁹ trial court on the admission of proofs relative to the measure of damages. This court has said that errors must be specifically assigned in the petition in error or they will be disregarded: *Cortelyou v. Maben*, 40 Neb. 512; *Hedrick v. Strauss*, 42 Neb. 485; *Bloedel v. Zimmerman*, 41 Neb. 695; *Omaha v. Richards*, 49 Neb. 244. No reversible error being disclosed, the judgment is accordingly affirmed.

ALL CONTRACTS OF AN INFANT, except those for necessities, are voidable by him at his election within a reasonable time after he becomes of age: *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665. See the exhaustive note to *Craig v. Van Bebber*, 18 Am. St. Rep. 571-724, on contracts of infants.

AN INFANT, HIRING A HORSE to go to a certain place, and going elsewhere, is liable for conversion: *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340. Contra, *Penrose v. Curren*, 3 Rawle, 351, 24 Am. Dec. 356. See, further, *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519; and the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 720-724, discussing the torts of infants connected with contracts.

TO IMPEACH A PARTY TO A SUIT, declarations made by him can be offered in evidence without laying any foundation therefor: Note to *Skaggs v. Martinsville*, 49 Am. St. Rep. 213.

AN APPELLATE COURT WILL DECLINE to consider an uncertain and indefinite assignment of error; it should specify the particular error complained of: *National Fertilizer Co. v. Holland*, 107 Ala. 412, 54 Am. St. Rep. 101. Objections to evidence, to be of any avail, must be reasonably specific: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196, 3 Am. St. Rep. 633.

BACHELOR v. KORB.

[58 NEBRASKA, 122.]

GUARDIAN AND WARD—BONDS—SALE OF WARD'S REAL PROPERTY.—A statute providing that a guardian licensed to sell real estate "shall, before the sale, give bond to the judge of the district court with sufficient surety or sureties, to be approved by such judge," is mandatory, and where the bond given by the guardian was not approved by the judge of the district court, the guardian's sale of his ward's real estate is void.

GUARDIAN AND WARD—GUARDIAN'S OATH—SALE OF PROPERTY.—The failure of a guardian, licensed to sell his ward's real estate, to take and subscribe an oath "before fixing on the time and place of sale," as required by statute, renders the sale, if made, void.

GUARDIAN AND WARD—GUARDIAN'S SALE—ESTOPPEL OF WARD.—The fact that the proceeds of a guardian's sale are applied toward the maintenance and education of the wards does not estop them from denying the validity of the sale.

GUARDIAN'S SALE.—THE DOCTRINE OF CAVEAT EMPTOR applies to purchasers at guardians' sales. Hence one who purchases real estate at a guardian's sale or purchases from the vendee of that sale must take notice at his peril of the authority of the guardian to make the sale.

T. J. Mahoney and C. J. Smyth, for the plaintiffs in error.

M. McLaughlin and J. C. Crawford, for the defendants in error.

124 RAGAN, C. Andrew Bergthold died intestate in Cuming county, Nebraska, in October, 1877, leaving a widow, Amelia, and three children. The deceased died the owner of certain real estate. About a year after Bergthold's death his widow married one Ferdinand Schmela, who was subsequently appointed administrator of Bergthold's estate. Upon the petition of Schmela's wife the probate court of Cuming county appointed her husband, Schmela, the guardian of the three minor children of Bergthold, deceased, the children being at that time nine, eleven, and thirteen years of age, respectively. This appointment of Schmela as guardian was made about September, 1885. On September 3, 1887, the judge of the district court of Cuming county, in pursuance of the guardian's petition therefor, granted him a license as such guardian to sell the real estate of his wards for the purpose of raising money to educate and support them. In pursuance of this license the guardian advertised and sold at public auction the real estate of his wards to one Wenzel F. Kriz on September 30, 1887, and on October 14, 1887, executed and delivered to him a guardian's deed for such real estate. George Korb, Jr., Charles Korb, and J. A. Johnson now claim title to the real estate through Kriz. The heirs of Bergthold, having become of age, brought this, an action in the nature of ejectment, in the district court of Cuming county against the Korbs and Johnson to recover possession, with rents and profits, of said real estate. The district court entered a judgment dismissing the action of the heirs, to review which **125** they have filed here a petition in error. The sole question in the case is the validity of the guardian's sale. If that sale was not void, the judgment of the district court is correct. If it was void, the judgment is wrong and the plaintiffs in error were entitled to the judgment of the district court prayed for in their petition filed therein.

1. Authority for a guardian to sell the land of his wards for their maintenance and education and the procedure regulating

such sale are found in sections 42 to 64, both inclusive, of chapter 23 of the Compiled Statutes of 1897. Section 54 of this chapter provides: "Every guardian licensed to sell real estate, as aforesaid, shall, before the sale, give bond to the judge of the district court with sufficient surety or sureties, to be approved by such judge, with condition to sell the same in the manner prescribed by law." Section 64 of such chapter provides: "In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

2. That he [the guardian] gave a bond which was approved by the judge of the district court, in case any bond was required by the court upon granting the license." In the proceeding for the sale of his wards' real estate instituted and carried on by the guardian he executed with sureties a bond, the judge of the district court of Cuming county being the obligee named therein. This bond was never presented to, nor in any manner approved by, the judge of said district court. It was, however, filed in the court and approved by the clerk thereof. The statute just quoted is mandatory, that a guardian licensed to sell his ward's real estate shall, before the sale, give a bond to the judge of the district court, to be approved by such judge. Unless such bond be given and approved, a guardian appointed in this state has no authority or jurisdiction ¹²⁶ to sell the real estate of his wards in this state for the purposes of their maintenance and education. The clause in the second subdivision of section 64, "in case any bond is required by the court upon granting the license," does not mean that the district courts are invested with discretion to require or not a guardian to give the bond required by section 54 as a condition precedent to his authority to sell the real estate of his ward. That provision in said section 64 has reference to the sales of real estate in this state made by foreign guardians who have given bonds to the courts appointing them. The guardian's sale of his wards' real estate was void, because the bond given by the guardian was not approved by the judge of the district court. It was not a valid bond until it was approved. The clerk had no authority to approve it, and the effect of the transaction is that the guardian made the sale without giving any bond at all. See upon the subject: *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Holden v. Curry*, 85 Wis. 504;

Currie v. Stewart, 26 Miss. 646; Babcock v. Cobb, 11 Minn. 247 (347); Rucker v. Dyer, 44 Miss. 591; Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229; Barnett v. Bull, 81 Ky. 127; Stewart v. Bailey, 28 Mich. 251; Ryder v. Flanders, 30 Mich. 336.

In this connection it is said by the defendant in error that the failure of the guardian to have the bond executed by him approved by the judge of the district court was an irregularity merely. The answer to this is, if it was an irregularity, it was such a one as the statute in effect prescribes shall avoid the sale.

Another contention of the defendant in error is that the provision of the statute requiring this bond to be approved by the judge of the district court is directory merely, and that this court held, in Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627, that such a bond need not be approved by the judge of the district court. The requirement of the statute that the district court shall approve this bond is not directory, but it is mandatory; and this court did ¹²⁷ not hold in Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627, or in any other case, either that the statute requiring this bond to be given was directory, or that, if given, and not approved by the judge, his failure to approve it was immaterial. The Myers-McGavock case was an action in ejectment by heirs. The defendants to that action claimed under a sale made by a guardian. It was insisted that that sale was void because the guardian had not given a bond approved by the judge granting the license as required by statute. Answering this objection we said: "A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding in which the license to sell the real estate of the wards was granted does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was, in fact, presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the pur-

pose of obtaining the license to sell the real estate was not formally approved: *Emery v. Vroman*, 19 Wis. *689 (724), 88 Am. Dec. 726; *Pursley v. Hayes*, 22 Iowa, 11, 92 Am. Dec. 350; *Hamiel v. Donnelly*, 75 Iowa, 93." This is not a holding that the approval of the guardian's bond by the judge granting him the license to sell is not an absolutely essential thing. The statute does not prescribe what shall constitute an approval of a guardian's bond to sell his ward's real estate. It does not declare what shall be the only evidence of the judge's approval of such bond. A formal approval of a bond would, perhaps, consist in the judge's ¹²⁸ writing on the bond "approved," or "this bond approved," or some such words, and signing his name. In the *Myers-McGavock* case the bond was actually presented to the judge, and the fact that he approved it was established by oral evidence—the best and the only evidence attainable—and we held that that was sufficient, and that the sale would not be declared void, not because the judge had not approved the bond, but because he had not formally approved it; that is, that the evidence that he had approved it did not appear upon the bond in writing. In the case at bar, the bond was never presented to the judge who granted the guardian license to sell. It was never approved by him in any manner whatever. He testified as a witness that the bond was never presented to him, nor approved by him.

2. Section 55 of said chapter 23, among other things, provides: "Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath," etc. The guardian fixed the time and place of sale of his wards' real estate on September 5, 1887, by publishing the first notice of his sale on that date, in which he recited that the sale would occur at a certain time and place on September 30th. He took and filed the oath required by statute on September 30th, whether before or after the hour fixed for the sale is not disclosed by the record. This did not comply with the statute. It required him to take and subscribe an oath "before fixing on the time and place of sale." In effect, he did not take and subscribe the oath required by the statute. The statute of Wisconsin on the subject under consideration provides that the guardian shall, "before fixing on the time and place of sale, take and subscribe an oath," etc. In *Blackman v. Baumann*, 22 Wis. *611, a guardian was licensed by the court to sell his ward's real estate for the latter's education and maintenance. The sale occurred on December 10, 1850. The guardian took and subscribed the oath

required by the statute on the same day. The court said: "For it appears that the guardian ¹²⁹ did not take the oath until the day the sale was made; in other words, he did not take it 'before fixing on the time and place of sale,' as required by this section. But it is said, inasmuch as it appears that the proper oath was taken by the guardian before the sale was actually made, that this should be deemed a sufficient compliance with the statute upon that matter. The provision, however, is peremptory that the oath required shall be taken before fixing on the time and place of sale. Can the court say, in view of language so explicit, that the oath need not be taken before fixing on the time and place of sale, but may be taken at any subsequent time? We think the court has no right to take such liberties with the statute and disregard a requirement so plainly expressed, even to sustain a sale otherwise regular. To do so would be assuming the province of the law-making power. We are therefore unable to see upon what principle the sale in this case can be held valid"; and it was ruled in that case that because the oath was not taken and subscribed by the guardian before he fixed upon the time and place of his sale the latter was absolutely void. To the same effect are *Williams v. Reed*, 5 Pick. 480; *Parker v. Nichols*, 7 Pick. 111; *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Ryder v. Flanders*, 30 Mich. 336. Indeed, there seems to be no conflict among the authorities that the failure of the guardian to take and subscribe the oath before he fixes upon the time and place of the sale renders the sale void. We are of opinion, therefore, that the sale made by the guardian in this case was and is void, because the bond given by the guardian in pursuance of section 55 of said chapter 23 was not approved by the judge who granted the license, and because the oath taken and subscribed by the guardian was not so taken and subscribed "before fixing on the time and place of sale."

3. An argument of the defendants in error is that the heirs are estopped from maintaining this suit because they, the defendants in error, at the time they purchased ¹³⁰ the property, went into the actual possession thereof and have since been in such possession; that they have made improvements upon the property of the value of four hundred dollars, and have paid taxes and insurance on the property amounting to two hundred and ninety-two dollars and seventy-three cents, and that during all the time the defendants in error have been in possession the

heirs and their guardian, though living in the same locality with the defendants in error, made no objection or protest to the defendants in error and gave them no notice that they had or claimed any title in the premises; that the defendants in error purchased the premises from the mother of the plaintiffs in error, and paid her therefor the sum of two thousand three hundred and twelve dollars, and assumed and paid off upon the property certain liens put thereon by the mother of the plaintiffs in error while she owned it; that a large portion of the money expended by the defendants in error in the purchase of said real estate and the discharging the liens thereon was used and expended by the guardian of the plaintiffs in error for their education and maintenance, and that they have not paid, nor offered to repay, the same to the defendants in error. But the fact, if it is a fact, that the proceeds of the guardian's sale of the real estate of these wards was applied by him toward their maintenance and education does not estop them from denying the validity of the sale: *Wilkinson v. Filby*, 24 Wis. 441; *Requa v. Holmes*, 26 N. Y. 338; *Rowe v. Griffiths*, 57 Neb. 488.

But the defendants in error, though they may have paid a valuable consideration for this real estate, are not innocent purchasers of it. One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of caveat emptor applies to purchasers at guardians' sales. The guardian in this case reported that on September 30, 1887, he had sold his wards' real estate for two thousand seven hundred dollars cash to one Wenzel F. Kriz. This report he filed in court on October 14, 1887. On that same date the guardian executed and delivered ¹³¹ his deed for the real estate to Kriz, and on October 17th of said year Kriz and his wife, for the same purported consideration of two thousand seven hundred dollars, conveyed the real estate to the guardian's wife. The defendants in error claim by conveyance from her. An intending purchaser of this real estate, looking at the record of its title, would have seen in this transaction of a sale by the guardian to Kriz and a deed to him for two thousand seven hundred dollars, and three days afterward a deed from Kriz for two thousand seven hundred dollars to the guardian's wife, sufficient to have aroused the inquiries and suspicions of any prudent man, and these inquiries, if pursued with any diligence whatever, would have probably revealed the fact

that Kriz never paid anything for this real estate; that the entire proceeding instituted and carried on by this guardian was for the purpose of depriving his wards of the title to their property and vesting it in his wife.

We are not deciding that where a guardian's sale is absolutely void that anyone can be protected as an innocent purchaser for value of the real estate sold; but what we do say is, that if these defendants in error are to suffer a loss, it is the result of their own negligence. There was enough upon the face of this record to have deterred any prudent man from investing his money in this property. The fact that defendants in error discharged liens upon this property put thereon by the wife of the guardian affords not the slightest reason why this real estate, when handed over to these heirs, should be burdened with the amount of those liens. Those liens were not upon the real estate when the title to it vested in the heirs upon their father's death. We think the most the defendants in error are entitled to is to set off the taxes upon this real estate paid by them, which were liens upon it against the rents and profits. If the money paid by defendants in error to the mother of these children for this real estate was by her used toward the maintenance and education of her children, the latter cannot be charged with it in favor of defendants in error. She was not their legal guardian. No part of the money expended ¹³² by the defendants in error went to the guardian of the heirs and was used by him for their benefit. The judgment is reversed and the cause remanded.

GUARDIANS' SALES.—Statutory proceedings by a guardian to divest his ward of real estate by sale must be strictly pursued: *Leuders v. Thomas*, 35 Fla. 518, 48 Am. St. Rep. 255. Statutes governing such a sale are peremptory, and to render it valid the guardian must take the oath required by the statute before fixing on the time and place thereof: *Cooper v. Sunderland*, 3 Iowa, 114, 63 Am. Dec. 53; and a conveyance by him, without giving the statutory bond, vests no title in the grantee: *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229. Under a statute requiring a petition, license, oath, bond, and notice of sale, a guardian's sale of his ward's real estate is void if these statutory requirements are not complied with: *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

GUARDIANS' SALES—ESTOPPEL.—A ward who has received and enjoyed the proceeds of his guardian's sale is estopped to set up title to the land sold at such sale and in possession of an innocent purchaser: *Penn v. Heisey*, 19 Ill. 295, 68 Am. Dec. 597; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460. But see *Foley v. Mutual Life Ins. Co.*, 138 N. Y. 333, 34 Am. St. Rep. 456; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

THE RULE OF CAVEAT EMPTOR is applicable to purchasers at a guardian's sale: *Leuders v. Thomas*, 35 Fla. 518, 48 Am. St. Rep. 255; *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411.

KNIGHTS v. STATE.

[56 NEBRASKA, 225.]

CRIMINAL TRIAL—INSANITY—BURDEN OF PROOF. In a criminal prosecution the law presumes sanity, but when the defendant produces evidence tending to prove insanity, the law then imposes on the state the burden of establishing the sanity of the accused, the same as any other material fact necessary to warrant a conviction.

CRIMINAL TRIAL—INSANITY—WHEN SUFFICIENT TO ACQUIT.—There is no criminal responsibility where at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing wrong.

CRIMINAL TRIAL—INSANITY.—AN INSTRUCTION is erroneous which tells the jury to acquit the defendant on the ground of insanity only when he was incapable both of understanding the nature of his act, and of distinguishing between right and wrong with respect to that act.

TRIAL—EVIDENCE OF OWNERSHIP.—It is competent to prove by parol evidence the ownership of a building where it does not appear that the building was realty.

TRIAL—EVIDENCE OF OTHER CRIMES.—Where a defendant is on trial for a specific offense, evidence of other similar offenses committed about the same time is admissible for the purpose of establishing the criminal intent of the accused.

ARSON—EVIDENCE OF INSURANCE.—Upon the trial of an accused for burning property for the purpose of recovering the insurance, where the accused refuses to produce the insurance policies, secondary evidence is admissible to show the contents of the policies, that they were made out by authorized agents of the insurance companies, and that the accused was claiming indemnity under them.

Duffie & Van Dusen and Jesse T. Davis, for the plaintiff in error.

C. J. Smyth, attorney general, and W. D. Oldham, deputy attorney general, for the state, the defendant in error.

²²⁶ SULLIVAN, J. In the district court of Washington county, George Knights was convicted of the crime of arson and sentenced to imprisonment in the penitentiary for a term of twelve years. The first count of the information ²²⁷ charged the burning of an insured stock of merchandise owned by the defendant, and the second charged the burning of a leased store building in which the property was kept. The jury found in favor of the state upon both counts.

Exception was taken to the fifth instruction on the theory that it assumes that the merchandise in question was insured

and that the insurer was a corporation. This paragraph of the charge plainly professes to be a statement of the facts necessary to be established to warrant a conviction; and it seems to us that neither a casual nor critical reading of it could possibly lead a person of average intelligence to suppose that the existence of any essential fact was assumed by the court. Doubtless a more perspicuous presentation of the issues might have been made; but the thought of the instruction is evident and the language sufficiently apt.

In relation to the defense of insanity, upon which the prisoner relied, the court said to the jury in the twelfth instruction: "You are instructed that the law presumes that every person is sane, and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact to be established by the state to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged burning described in the information raises in your mind a reasonable doubt of his sanity, at the time of the alleged burning, then your verdict should be acquittal." It is contended that this instruction gave the jury to understand that the burden of establishing his insanity rested upon the defendant up to a certain point in the trial, and was then shifted from him to the state. *Snider v. State*, 56 Neb. 309, is cited as authority for this contention. Whatever may be said of the meaning of the instruction considered ²²⁸ in the *Snider* case, there can be no room to doubt that the court, in the instruction now under consideration, stated the correct doctrine in unmistakable terms. In this case the jury were informed that the law presumes sanity, but that when the defendant produced evidence tending to prove insanity, the state was charged with a burden which did not previously rest upon it. The court did not say, nor imply, that the burden of proving insanity was ever on the accused, or that there was a shifting of the burden from him to the state. The substance of what the court did say was, that when the legal presumption of sanity encountered opposing evidence, the law then, for the first time, imposed on the state the onus of showing the prisoner's sanity by the proper measure of proof.

The thirteenth instruction was also excepted to, and its correctness is now vigorously challenged. It is as follows: "You

are instructed that insanity which renders a person irresponsible for an act is such a diseased condition of the mind as renders the person incapable of understanding the nature of such act and incapable of distinguishing between right and wrong with respect to such act. So in this case, if the evidence introduced tending to show that the defendant was at the time of the fire incapable of understanding and knowing what he was doing, and that at such time he could not distinguish between right and wrong, raises in your mind a reasonable doubt of the defendant's sanity at the time of such fire, then you should acquit him." By this instruction the jury were plainly told that they might acquit the defendant, on the ground of insanity, only in case: 1. He was at the time of the fire incapable of understanding the nature of his act; and 2. That he was at the same time incapable of distinguishing between right and wrong with respect to that act. Such is not the law, and the giving of this instruction was an error fatal to the conviction. Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy ²²⁹ property they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury in this case may have believed that the defendant applied a lighted match to the property in question understanding well that combustion would follow and that the store building and its contents would be reduced to ashes, and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act. In the answer of the English judges to the questions propounded by the house of lords, as a result of the acquittal of McNaghten for the killing of Drummond (McNaghten's Case, 10 Clark & F. 200), Chief Justice Tindal, speaking for himself and his associates, among other things, said that there is no criminal responsibility where, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." The rule thus announced has been, since 1843, the unquestioned law in England, and it is now the generally accepted doctrine of the American courts. It was recognized by this court in *Wright v. People*, 4 Neb. 407, and has been since frequently approved: *Hawe v. State*, 11 Neb. 537, 38 Am. Rep. 375; *Hart v. State*, 14 Neb. 572; *Thurman v. State*, 32 Neb. 224. In *Hawe v. State*, 11

Neb. 537, 38 Am. Rep. 375, it was said: "And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible."

Another assignment of error earnestly pressed upon our attention relates to the action of the court in permitting W. S. Cook, Esq., a member of the Washington county bar, to make the opening argument for the state. We gather from the record that Messrs. Frick & Dolezal had been appointed by the court at a former term to assist the county attorney in conducting the prosecution; ²³⁰ that Mr. Dolezal was present at the trial and an active participant therein; that Mr. Cook, who was the local agent of the companies which had insured the property in question, was a witness for the state and sat during the trial with the county attorney and his assistant, advising and consulting with them. Before the evidence was closed he did nothing, so far as we can learn, to indicate that he was connected with the case in the character of an attorney for the state. When his right to make an argument was challenged he made it appear that he had recently formed a law partnership with Mr. Dolezal, whereupon the defendant's objection was overruled and an order entered substituting the new firm for the old. As the question argued cannot arise when the cause is again tried, we need not decide it; but it will not be out of place to remark here that we seriously doubt the propriety of the court's action. The statute provides that the county attorney, in the trial of any person charged with a felony, may, under the direction of the court, procure such assistance "as he may deem necessary for the trial." This would seem to contemplate the selection and appointment of assistant counsel before the commencement of the trial. The spirit and policy of our laws recognize the right of a defendant in a criminal case to be informed in advance not only of the nature of the accusation, but also of the forces that are to be marshaled against him. In public prosecutions fairness is a cardinal virtue which the representatives of the state should not be permitted to ignore. A defendant should not be forced to submit the question of his guilt or innocence to a jury organized with special reference to their capacity or inclination to receive and assimilate the arguments of private counsel called from ambush after they have been chosen. Sometimes a peremptory challenge may be used most effectively to exclude from the jury-box a friend, relative,

or client of one of the attorneys for the state. We are entirely satisfied that the failure of Mr. Cook to appear in the character of an attorney in the earlier stages of the ²³¹ case was not intended to be tactical; but it may, nevertheless, have given the state an unfair advantage over the defendant. In selecting a jury for the trial of a criminal case a defendant usually makes his adjustments with reference to the relation of individual jurors to opposing counsel, so far as he may know what they are. This is his right. The peremptory challenges are his to use for his own advantage as reason or instinct may suggest.

We pass now to the testimony of Mr. Unland touching the ownership of the store building described in the information. It is contended on behalf of the defendant that the court received parol evidence tending to prove the title to real property, and that its action in this regard was prejudicial error. It is, of course, true that every fact must be established by the best evidence attainable, and that secondary evidence is not admissible until some legal excuse has been given for failing to produce the original. But here the ownership of land was not in issue, and there was no proof whatever that the building in question was real estate. Mr. Unland testified that he built it and that it was his property. To hold that the ruling of the court was erroneous we would have to presume that building was realty. This we cannot do.

The next error assigned relates to rulings of the court in admitting evidence tending to show that on the night the Unland building was burned the defendant set out other fires in adjacent buildings. The testimony was properly received, not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of the defendant. The state was not only required to show that the defendant ignited the Unland store, but it was required to go further and satisfy the jury that the act was intentional and not an accident. The effect of the evidence was properly limited by an instruction, and its submission to the jury was not legally prejudicial: *State v. Raymond*, 53 N. J. L. 260; *Commonwealth v. McCarthy*, 119 Mass. 354; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Rice on Criminal Evidence*, 453.

²³² Other assignments of error have reference to the means employed to prove that the stock of merchandise and store building mentioned in the information were insured at the time of the fire. We think the evidence introduced was the best

obtainable, and that is all the law requires. The policies were in possession of the defendant, and he refused to produce them after being notified to do so. It was then competent to show their contents, that they were made out and delivered by an authorized agent of the companies, and that the defendant was claiming indemnity under them: *State v. Mayberry*, 48 Me. 218; *McGinnis v. State*, 24 Ind. 500; *State v. Gurnee*, 14 Kan. 111; *Rice on Criminal Evidence*, 46. The petition in error contains many other assignments, but as they have not been discussed by counsel they will not be considered. The judgment is reversed and the cause remanded for further proceedings.

Insanity as an Excuse or Defense for Crime.*

In this note we shall treat of insanity which operates to relieve one from criminal responsibility, and not insanity which by reason of its existence prevents a man from being tried for the commission of a crime; or, in other words, insanity as a defense for crime, and not as a defense for trial. As to this latter subject it will be sufficient to observe that while insane a man can neither be tried, sentenced, nor executed: *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; for the reason that his insanity disables him from making a rational defense.

Insanity is a Complete Defense.—We are concerned here, primarily, with that insanity which will furnish a complete defense to the crime with which one is charged. In fact, it may be stated as a general rule that insanity when interposed as a defense to a criminal prosecution is either a complete defense or none at all. This question becomes one of practical import in relation to those crimes which the law has separated into degrees in which a specific intent is requisite to constitute the offense in the first degree, but the same element is unnecessary to a consummation of the offense in the second degree. In such cases the question arises whether the insanity set up is of a character sufficient to deprive the accused of the capacity to entertain a specific intent, and yet not sufficient to relieve him from criminal liability altogether. In other words, can there be insanity which will lower the degree of crime for which an accused is responsible? The doctrine is advanced by Wharton, in his work on Criminal Law, section 47, that partial insanity may be a mitigating element in determining the degree of crime of which an accused may be convicted. See, also, 1 Wharton & Stillé's Medical Jurisprudence, section 200, for the same doctrine. There are undoubtedly cases where the condition of a person's mind, cou-

* REFERENCE TO MONOGRAPHIC NOTES.

Insane delusions affecting criminal responsibility: 63 Am. St. Rep. 100-106.

Insanity as a defense for crime: 36 Am. Dec. 402-410; 60 Am. Rep. 212-225.

Burden of proof when insanity is interposed as a defense for crime: 86 Am. Rep. 32-40.

pled with and influenced by the immediately surrounding circumstances, are such as to render him incapable of having a specific intent. The case of crime committed while one is under the influence of liquor is a familiar example. This drunkenness, however, is not regarded as insanity. And from a legal standpoint it may be doubted whether any mind which is incapable of entertaining a specific intent solely by reason of its connection with and its being influenced by circumstances immediately surrounding it is in such a state that its possessor may be termed insane. The law, from practical reasons, is not disposed to enter into those refinements of reasoning upon which such a state of insanity is based, though it may appear like a mere juggling with terms to refuse to recognize insanity which will lower the degree of crime for which a person can be held responsible, and at the same time permit the condition of mind as influenced by outside circumstances to be shown in order to determine the grade of crime committed. Yet we believe there is a valid distinction between the two rules. The first seems to countenance the bald doctrine that a person may be so insane as not to be able to form a specific premeditated intent to kill, and at the same time be sane enough to distinguish between right and wrong and to form a general intent to kill or to do great bodily harm. Such a doctrine, we believe, is not recognized by the law, and never has been. The second rule, on the other hand, admits that at the moment of the commission of a crime the mind of the perpetrator may have been so worked upon and so under the influence of outside causes that it was incapable of exercising a specific intent. Such are cases of drunkenness and the commission of crime in hot blood. And the condition of the mind at the time of the crime, together with the surrounding circumstances, may be shown, not for the purpose of establishing insanity, but to prove that the situation was such that a specific intent was not entertained. Insanity, then, as a defense for crime is either a complete defense or none at all. The law does not recognize a grading of it to correspond with the degrees of crime. As was said in *Commonwealth v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625: "To say that a man is insane to an extent which incapacitates him from fully forming an intent to take life, yet enables him to fully and maliciously form an intent to do great bodily harm without a purpose to take life, is absurd, for the one involves the same test of responsibility as the other, the ability to distinguish between right and wrong." *United States v. Lee*, 4 Mackey, 489, 54 Am. Rep. 293, is to the same effect, holding that there can be no such doctrine as that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. *Sage v. State*, 91 Ind. 141, draws the distinction we have already noticed, and refuses to recognize partial insanity as a mitigating element in the degrees of crime, and says that: "Independently of

any question of insanity the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character": See, also, *Commonwealth v. Hollinger*, 190 Pa. St. 155. The doctrine that partial insanity may be a mitigating element to reduce the degree of the crime seems to be recognized in *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669. Yet this partial insanity was not such as rendered the accused incapable of having a specific intent, but merely that his frame of mind influenced by the surrounding circumstances, proved the nonexistence of a specific intent as a fact. And, as illustrated by the case of *Spencer v. State*, 69 Md. 28, in the face of evidence showing deliberate premeditation in the perpetration of the offense, partial insanity cannot be shown to reduce the degree of the crime.

Time at Which Insanity must Exist.—Insanity need not exist for any definite period of time before the commission of the offense. It is only necessary that it exist at the moment when the act occurred with which the accused stands charged: *State v. Graviotte*, 22 La. Ann. 587; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731, and cases cited subsequently. If, at the time of the commission of the crime, the accused was sane, it is wholly immaterial whether or not he was insane at some other period of his life: *Commonwealth v. Winnemore*, 1 Brewst. 356; whether the insanity existed before: *State v. Spencer*, 21 N. J. L. 196; or after the offense: *Jones v. State*, 13 Ala. 153; *Shultz v. State*, 13 Tex. 401.

Presumption that Sanity or Insanity Continues.—If sanity is shown to exist just prior to and just after the commission of the crime, it is presumed to exist at the time of the act: *Commonwealth v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625; *Lynch v. Commonwealth*, 77 Pa. St. 205. Whether, when a person is shown to have been insane at one time, the presumption arises that he continues to be insane until the contrary is proven, seems to be a matter of some conflict. This conflict would, however, appear to be more apparent than real. The statement is met with frequently that proof of insanity antecedent to the offense raises the presumption that the disease continues until reason is fully restored: See *Commonwealth v. Winnemore*, 1 Brewst. 356; *People v. Montgomery*, 13 Abb. Pr., N. S., 207; *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372. The last case cited indicates that the rule is one of varying force, and in fact whether such a presumption is raised at all depends entirely upon the character of the insanity with which the accused was afflicted prior to the commission of the offense. The mere fact that one has been insane does not, in criminal matters, carry with it a presumption that he continues in such a state until the contrary is shown, for the reason that one may be insane in some re-

spects and still be criminally responsible: *Montgomery v. Commonwealth*, 88 Ky. 509; *Hunt v. State*, 33 Tex. Cr. Rep. 252; *Smith v. State*, 22 Tex. App. 316; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638. In this last case it was even said that there is no presumption of law whatever as to the continuance of disease of any kind. This rule is too extreme as applied to insanity, however, and the correct rule undoubtedly is that when permanent, habitual, or chronic insanity is once proved to have existed, the law entertains the presumption that it continues until the contrary is shown. But as to insanity which is merely temporary and spasmodic, no such presumption arises: *Hunt v. State*, 33 Tex. Cr. Rep. 252; *People v. Francis*, 38 Cal. 183; *Armstrong v. State*, 30 Fla. 170; *State v. Reddick*, 7 Kan. 143; *Carpenter v. Carpenter*, 8 Bush, 283; *State v. Lowe*, 93 Mo. 547; *Ford v. State*, 73 Miss. 734; *State v. Wilner*, 40 Wis. 304. To establish the basis of a presumption that insanity once shown to have existed continues to exist, the insanity must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility, or even probability, of its recurrence, as in case of temporary insanity: *People v. Schmitt*, 106 Cal. 48. The rule applies only when the insanity itself is permanent, and not when the cause which produces the diseased mind is permanent, since a temporary cause may produce permanent insanity and a permanent cause may produce but periodic mania: *People v. Schmitt*, 106 Cal. 48. Not only must the insanity be of a permanent character in order to raise a presumption of its continuance, but too long a period of time must not have elapsed between the proved insanity and the act of crime charged. If the evidence of the proved insanity refers to a period long before the criminal act was done, it is of little weight in establishing insanity at the time of the offense: *Langdon v. People*, 133 Ill. 382. The courts of Tennessee hold a doctrine opposed to the cases already cited, and seem to furnish the only real conflict on the question of the presumption of a continuance of insanity. In *Overall v. State*, 15 Lea, 672, the court said that it could see no reason why the presumption should not apply to temporary and periodical lunacy, as well as to a habitual and permanent derangement, or why "an offense perpetrated by one temporarily insane should not be inquired of by the same rules of law and evidence as one perpetrated by an individual permanently and hopelessly insane." As already indicated, the weight of authority is against this view, and we believe the sounder and more practical reason as well.

Test of Accountability, Generally.—In order that a person may be held responsible for the commission of a crime, he must be a responsible being capable of distinguishing between right and wrong: *Commonwealth v. Heath*, 11 Gray, 303; *People v. Klein*, 1 Edm. Sel. Cas. 13; and must possess sufficient intelligence to be able to form a criminal intent, because a criminal intent is the essence of crime: *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State v.*

Peel, 23 Mont. 358, 75 Am. St. Rep. 529; *People v. Carnel*, 2 Edm. Sel. Cas. 200. An idiot or an imbecile does not possess sufficient intelligence to be held responsible for an act of crime: *Hays v. Commonwealth* (Ky.), 33 S. W. Rep. 1104; *Pettigrew v. State*, 12 Tex. App. 225; neither does a lunatic: *Ancient Order United Workmen v. Holdom*, 51 Ill. App. 200. The test of accountability is not high, however, and the mental endowment of a person may even be of an inferior order, and yet the person can be held responsible for crimes which he may commit. A higher degree of insanity must be shown, in order to absolve a defendant in a criminal case from guilt, than would be sufficient to discharge him from the obligations of his contract: *Webb v. State*, 5 Tex. App. 596; *Montgomery v. Commonwealth*, 88 Ky. 509; *State v. Larkins* (Idaho), 47 Pac. Rep. 945. But he need not be capable of carefully weighing the reasons for and against his act: *State v. Swift*, 57 Conn. 496. In one case the rule was laid down that if the accused only had such intelligence as is common to children of tender years he should be acquitted. This was in a case where the defendant was suffering from want of mind, rather than from derangement of mind: *State v. Richards*, 39 Conn. 591. Immunity from crime cannot, however, be predicated upon a merely weak or low order of intellect, coupled with an otherwise sound mind. "The law does not undertake to measure the intellectual capacities of men," said the court, in *Wartena v. State*, 105 Ind. 445. "Imbecility of mind may be of such a degree as to constitute insanity in the eye of the law, but mere mental weakness, the subject being of sound mind, is not insanity, and does not constitute a defense to crime. The law recognizes no standard of exemption from crime less than some degree of insanity or mental unsoundness." To the same effect, see *People v. Burgess*, 153 N. Y. 561; *People v. Hurley*, 8 Cal. 390. In accordance with the above rule, a rejection of evidence showing the low order of intellect and the great ignorance of a defendant was held proper, where the evidence was not for the purpose of showing him non compos mentis: *Patterson v. People*, 46 Barb. 625. And in *Battle v. State*, 105 Ga. 703, the mere fact that the defendant was stupid, simple minded, or of unsound mind at the time of the crime was not sufficient to relieve him from criminal responsibility, if he had reason sufficient to distinguish between right and wrong with reference to the act in question. Even partial insanity itself is no excuse for crime if the defendant was capable of distinguishing between right and wrong in regard to the particular act charged to be criminal: *State v. Huting*, 21 Mo. 464; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *United States v. Young*, 25 Fed. Rep. 710.

Power to Distinguish Between Right and Wrong.—What has already been said concerning the test of responsibility for crime has related wholly to the question of the general accountability of a person for his acts, and what condition of mind will and what will not relieve

one from criminal responsibility. For the practical administration of justice, however, it has been necessary to adopt tests which a jury might use in determining whether an accused was insane or not at the time he committed the offense. The main test which has been practically universally adopted, and which is applicable to the ordinary case where insanity is interposed as a defense, is what is known as the right and wrong test, or the ability of the accused to distinguish between right and wrong. This rule has nowhere been stated more satisfactorily than in the leading English case, *McNaghten's Case*, 10 Clark & F. 200, where it was said that "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." This rule, as established by this case, has been quoted with approval repeatedly by the courts of the various states, and is now the established rule everywhere so far as the general defense of insanity is concerned: See *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *State v. Wright*, 134 Mo. 404; *United States v. Young*, 25 Fed. Rep. 710; *Roberts v. State*, 3 Ga. 310; *Brinkley v. State*, 58 Ga. 296; *Dunn v. People*, 109 Ill. 635; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *State v. Schaefer*, 116 Mo. 96; *Loeffner v. State*, 10 Ohio St. 598; *State v. Murray*, 11 Or. 413; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *State v. Brandon*, 8 Jones, 463; *Clark v. State*, 8 Tex. App. 350; *Dove v. State*, 3 Heisk. 348; *Johnson v. State*, 100 Tenn. 254. The defect of reason must be due to disease of the mind: *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *State v. Murray*, 11 Or. 413; *State v. Brandon*, 8 Jones, 463; *Clark v. State*, 8 Tex. App. 350. The capacity to distinguish between right and wrong need not be general; it is only necessary that it relate to the particular act in question. A person may be perfectly sane on every subject but one, and yet if that one subject is the very act with which he is charged, and with respect to it he is unable to distinguish between right and wrong, his defense is complete: *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *Myers v. People*, 156 Ill. 126; *United States v. Young*, 25 Fed. Rep. 710; *United States v. Ridgeway*, 31 Fed. Rep. 144; *United States v. Faulkner*, 35 Fed. Rep. 730; *Choice v. State*, 31 Ga. 424; *Hornish v. People*, 142 Ill. 620; *State v. Nixon*, 32 Kan. 205; *State v. O'Neill*, 51 Kan. 651; *Casey v. People*, 31 Hun, 158; *Brown v. Commonwealth*, 78 Pa. St. 122; *State v. McIntosh*, 39 S. C. 97. But his defense is not complete and he is not entitled to acquittal on the ground of insanity if at the time of the commission of the crime he had sufficient capacity to enable him to distinguish between right and wrong, to understand the nature and consequences of his act,

and had mental power sufficient to apply that knowledge to his own case: *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State v. Gut*, 13 Minn. 341. If a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, whatever may be his mental weakness, he is in the eye of the law of sound mind and memory, and subject to punishment: *Evers v. State*, 31 Tex. Cr. Rep. 318, 37 Am. St. Rep. 811; *State v. Lewis*, 20 Nev. 333. The offender need not be aware that the act was legally wrong; it is his capacity of mind to distinguish the moral character and quality of the act that determines his criminal responsibility: *Willis v. People*, 32 N. Y. 715; *United States v. Clarke*, 2 Cranch C. C. 158; *State v. McIntosh*, 39 S. C. 97.

The right and wrong test has been criticised and attacked especially by medical writers, but its utility as a practical guide in the administration of substantial justice has been amply demonstrated by experience. In cases of insane delusion and of irresistible impulse some of the courts have gone beyond this primary test of the ability of the accused to distinguish between right and wrong, and in cases where the insanity takes the form of a delusion or an irresistible impulse have sought to establish other tests for the guidance of juries in passing on the question of the insanity of an accused. What these tests are will be noticed later. From the very nature of the subject, it is obviously most difficult to establish hard-and-fast rules by which to determine whether a defendant is sane or insane. Between the well-balanced intellect and imbecility there is the most gradual, continuous, and unbroken descent. The line which marks the division of the sane from the insane mind is invisible. And yet courts are compelled to draw this line in ascertaining whether or not an accused is legally responsible for his act, and they must have in mind not only the administration of justice to the individual accused, but also the safety and protection of the community. Out of the necessity of the courts to establish an arbitrary rule, and the duty to administer individual justice and protect the community have grown this test of the knowledge of right and wrong by which is determined the responsibility of an accused for his acts. The universality of its acceptance is practical proof of its utility in the administration of criminal justice.

Insane Delusions.—The ability to distinguish between right and wrong as a test of criminal responsibility is so thoroughly imbedded in the law that it is a matter of no doubt and little discussion. The great field of debatable ground lies in those cases where the accused is laboring under an insane delusion, or is overpowered by an irresistible impulse, or where he is subject to moral insanity alone. It will be unnecessary for us to enter into a discussion of these questions here, however, as they have been extensively treated in the monographic note to *People v. Hubert*, 63 Am. St.

Rep. 100-106; and a bare repetition of the doctrines deduced by the courts will be sufficient. An insane delusion to be a defense must be a mental delusion as distinguished from a moral one; it must be connected directly with the offense charged, and it must be such a delusion as, if true, would excuse the crime committed. The last part of this rule, viz., that the delusion must be such as would excuse the crime if the facts about which it exists are true, is generally recognized as essential, where the defense is simply that of insane delusion. But in *Merritt v. State*, 39 Tex. Cr. Rep. 70, it was said that the delusion need not be confined to such a situation, and even if it would not be a justification for the crime, if true, yet if it "was of such a character as to impair the mind of the person possessed thereof, to such an extent that the person was not able to discern the right or wrong of the particular act he was doing, and was induced to commit the particular act by the delusion, he would not be a criminal." This is undoubtedly true, because he is unable to distinguish between right and wrong, which is always a sufficient proof of insanity to relieve one of criminal responsibility.

Irresistible Impulse is recognized as a form of insanity which will operate as a defense for crime, although the person is capable of distinguishing between right and wrong, if by reason of the duress of mental disease he has lost the power to choose between the right and wrong and to avoid doing the act. In other words, if his free agency is destroyed by mental disease, he is not a responsible agent and cannot be held criminally responsible. As shown by the monographic note to *People v. Hubert*, 63 Am. St. Rep. 100-106, the authorities are divided on this question.

Moral Insanity is frequently spoken of as irresistible impulse, the two terms being used interchangeably. That they are quite different, however, is evidenced by the fact that irresistible impulse is recognized as a defense by courts which refuse such sanction to moral insanity. For example, the supreme court of Alabama sanctions irresistible impulse as a valid defense: *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; and at the same time says that "moral insanity, which consists of irresistible impulse, coexisting with mental sanity, has no support either in psychology or in law": *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20. Used in this sense, then, irresistible impulse and moral insanity are not the same, moral insanity consisting of a perverted condition of the moral system coupled with a sane mind, while an irresistible impulse is caused solely by mental derangement. Moral insanity of this character is not a defense for crime, and has never been so considered, unless the case of *Scott v. Commonwealth*, 4 Met. 227, 83 Am. Dec. 461, can be construed as announcing such a doctrine. The court uses these words: "Whether this impossibility of resistance arises from a subjugation of the intellect by the morbid impulse or propensity, or from an overwhelming and destruction of the faculties

of the mind to the extent of rendering the party incapable of governing his actions, is a point, it would seem, of not much practical importance." Whatever this language may mean, it is clear that the courts are practically a unit in refusing to sanction as a defense the kind of moral insanity we have already defined: See the monographic note to *People v. Hubert*, 63 Am. St. Rep. 100-106.

Drunkenness is in itself not insanity, and does not relieve an accused from responsibility for his criminal acts. We are not concerned here with any form of insanity which is less than a complete defense for crime, much less with drunkenness as a mitigating circumstance. Drunkenness, however, may be the cause of insanity, and if it is, the person so suffering is not deprived of his defense by reason of that fact. But in such a case it is the insanity and not the drunkenness which operates to relieve the accused of liability for his acts of crime. Mere temporary insanity, produced by the recent use of ardent spirits on the part of an accused, at the time he commits a crime is not ground for his acquittal: *Howard v. State*, 37 Tex. Cr. Rep. 494, 66 Am. St. Rep. 812; *State v. Bullock*, 13 Ala. 413; *Upstone v. People*, 109 Ill. 169; *State v. Hundley*, 46 Mo. 414; *Tyra v. Commonwealth*, 2 Met. (Ky.) 1. Voluntary intoxication can be no defense even though it make the person wholly unconscious of what he was doing at the time of the commission of the offense: *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; and though it may be the result of an irresistible appetite overcoming the will and amounting to a disease: *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556. There seems to be one exception to this rule, however, which is, that if a person is subject to a tendency to insanity which is liable to be excited by intoxication, of which he is ignorant, having no reason from his past experience, or from information derived from others, to believe that such extraordinary effects are likely to result from intoxication, he ought not to be held responsible for such extraordinary effects, since his actions result from these effects and not from the natural effects of drunkenness: *Roberts v. People*, 19 Mich. 401. And temporary insanity produced by the use of drugs, such as cocaine, is, in some states at least, recognized as a defense for crime: *Cannon v. State* (Tex.), 56 S. W. Rep. 351.

Settled insanity, on the other hand, which is produced by long-continued intoxication, affects responsibility in the same way as insanity produced by any other cause, and is a complete defense to a prosecution for crime: *People v. Travers*, 88 Cal. 233. It is the fact of insanity with which the law is concerned, and which constitutes the defense, and not the causes which produced such insane state. It is for this reason that insanity occasioned by previous habits of intemperance is entitled to the same consideration as an excuse for crime as is insanity from any other cause: *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Evers v. State*, 31 Tex. Cr. Rep. 318, 37 Am. St. Rep. 811; *Beasley v. State*, 50 Ala. 149,

20 Am. Rep. 292; *People v. Fellows*, 122 Cal. 233; *People v. Blake*, 65 Cal. 275; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. It is immaterial that the intoxication which produced the settled insanity was voluntary: *Fisher v. State*, 64 Ind. 435. The intoxication must result in a fixed mental disease of some continuance or duration before it will have the effect to relieve from responsibility for crime: *Lanergan v. People*, 50 Barb. 266. A person suffering under delirium tremens, who is so far insane as not to know the nature of his act or that he is doing wrong, is not punishable, and his condition is a defense: *United States v. McGlue*, 1 Curt. 1; *State v. McGonigal*, 5 Harr. (Del.) 510; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *French v. State*, 93 Wis. 325; for delirium tremens is insanity, and affects responsibility for crime the same as any other insanity: *Maconnehey v. State*, 5 Ohio St. 77; *State v. Hurley*, 1 Houst. Crim. Cas. 28; *State v. Thomas*, 1 Houst. Crim. Cas. 511. But it seems that when the memory alone is affected, there is no delirium tremens sufficient to excuse from crime: *State v. Stark*, 1 Strob. 479.

Burden of Proof.—The authorities are in conflict on the question upon whom lies the burden of proving the sanity or insanity of the defendant. The decisions range all the way from the statement that the prosecution must prove the sanity of the accused beyond a reasonable doubt to the proposition that the defendant must establish his insanity in an equally positive manner. That the burden is upon defendant of proving his insanity beyond a reasonable doubt is probably not the law anywhere at the present day, with the exception of Louisiana, as indicated by the decisions in *State v. De Rancé*, 34 La. Ann. 486, 44 Am. Rep. 426, and *State v. Clements*, 47 La. Ann. 1088. This rule, however, is so opposed both to the weight of authority and reason that it is unnecessary for us to discuss it. There are other early cases which seem to sanction such an extreme doctrine: *State v. Brinyea*, 5 Ala. 241; *State v. Spencer*, 21 N. J. L. 196. There are, however, three statements of the rule concerning the burden of proof which are found in the reported cases. One is that the burden of proof is on the state to establish the sanity of the accused beyond a reasonable doubt: See *Ford v. State*, 73 Miss. 734. See, also, *Davis v. United States*, 160 U. S. 469; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231. The legal presumption that every man is sane, however, obviates the necessity of introducing any evidence at all until this presumption is overthrown. When this occurs, the state must, in all jurisdictions, prove sanity beyond a reasonable doubt. The conflict in the cases, as we shall see, relates to when this legal presumption of sanity is sufficiently overthrown or weakened as to render it not conclusive. Another and perhaps the largest line of authorities states the rule to be that the burden is on the defendant to prove his insanity by a preponderance of the evidence: *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 778; *State v. Redemeier*, 71 Mo.

173, 36 Am. Rep. 462; *Ortwein v. Commonwealth*, 76 Pa. St. 414, 18 Am. Rep. 420; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680; *Ryder v. State*, 100 Ga. 528, 62 Am. St. Rep. 334; *State v. Trout*, 74 Iowa, 545, 7 Am. St. Rep. 499; *State v. Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879; *Keener v. State*, 97 Ga. 388; *State v. Wright*, 134 Mo. 404; *State v. Bell*, 136 Mo. 120; *People v. Bell*, 49 Cal. 485; *People v. Allender*, 117 Cal. 81; *People v. Hettick*, 126 Cal. 425; *State v. Parks*, 93 Me. 208; *Carlisle v. State (Tex.)*, 56 S. W. Rep. 365; *State v. Larkins (Idaho)*, 47 Pac. Rep. 945. Still a third line of cases hold that if the jury have a reasonable doubt as to whether the accused is sane or not they must acquit, and while the burden rests upon the defendant of introducing evidence to raise this doubt, such evidence need not preponderate, but is ample if it is sufficient to produce a reasonable doubt in the minds of the jury: *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Chase v. People*, 40 Ill. 352; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408; *Dacey v. People*, 116 Ill. 555; *Brotherton v. People*, 75 N. Y. 159; *Dove v. State*, 3 Heisk. 348.

One reason for this conflict of authority was pointed out in *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154, as being the attempt to apply to criminal cases the rules which govern the trial of issues in civil cases. In civil cases, if the defendant sets up any matter in excuse or avoidance, he must establish his defense by a preponderance of proof, but this is because he pleads matters which avoid the effect of the plaintiff's allegations, but does not deny them. Hence, it is right that he should have the burden of proof. But in criminal cases the defendant denies all the allegations in the indictment, and the burden is on the state to sustain them by sufficient proof. The two cases are not parallel, and the rules applicable to civil cases should not be applied to a criminal prosecution.

There is, however, less substantial conflict than would appear at first sight. All of the authorities start with two fundamental propositions upon which they are in complete harmony: 1. That the burden is on the prosecution to prove beyond a reasonable doubt that the defendant committed the crime; and 2. The law presumes every man to be sane. The conflict in the decisions arises by reason of the fact that the courts differ in their opinion as to how much evidence is necessary to overthrow this original presumption of sanity, and as to what quantum of evidence is sufficient to enable the court to say to the jury that the burden of proving the crime beyond a reasonable doubt has been successfully borne. The burden is upon the state to establish the guilt of the defendant beyond a reasonable doubt. To constitute a crime there must coexist a

criminal act with a criminal intent. To prove the intent without the act is as equally futile to establish criminal liability as to prove the act without the intent. Both are essential. And if the defendant was so insane as to be incapable of having any intent to commit the crime, he has not, in contemplation of law, committed any offense for which he can be held responsible. The burden, then, is on the state to establish both of these conditions of guilt beyond a reasonable doubt. From this there seems to us to be but one logical conclusion, which is, that, after the evidence is all in, and the case is submitted to the jury, if the jury have any reasonable doubt as to the sanity of the accused they must acquit. The question is not open to dispute that if the jury had a reasonable doubt as to whether the defendant committed the act or not they would and must acquit, since in such a case the state has not proved beyond a reasonable doubt that the defendant has committed the act with which he is charged. In reason, then, why should not the jury acquit if they have a reasonable doubt as to the existence of the other condition of guilt, viz., a mind sane enough to be capable of entertaining a criminal intent? Both conditions are essential to constitute the crime, and the proof requisite to conviction should in like manner be the same in both cases. This was the conclusion reached in a well-reasoned case in the United States supreme court, *Davis v. United States*, 160 U. S. 469, where the court, through Mr. Justice Harlan, said: "If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he willfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, capacity in law of the accused to commit that crime?" As pointed out by this case, this view is entirely consistent with the presumption which the law indulges in favor of sanity, for from the nature of things this presumption is necessary, and in the first instance it supplies the required proof of the capacity to commit crime. "But to hold that such presumption must absolutely control the jury until it is overthrown or im-

paired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged." Logically, this position is unassailable, and it is supported by respectable authority: *Armstrong v. State*, 27 Fla. 366, 26 Am. St. Rep. 72; *Armstrong v. State*, 30 Fla. 170; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State v. Reidell*, 9 Houst. 470, 480; *Walker v. People*, 88 N. Y. 82; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, and cases already cited.

The weight of authority seems to be against this view, however, on grounds of public policy and to secure public safety, and not because the cases we have been discussing are illogical. The burden of proof, according to all the authorities, is, in the beginning, on the prosecution. It is unnecessary to cite authorities on this point.

And while many of the authorities do not so state the rule, the burden of proof never shifts, the state still being obliged to establish the conditions of guilt, of which a mind capable of committing crime is one: *Ford v. State*, 73 Miss. 734; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Commonwealth v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689; *Turner v. Commonwealth*, 86 Pa. St. 54, 27 Am. Rep. 683. The state must establish every fact essential to make out the crime: *State v. Robbins*, 109 Iowa, 650; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231. The burden of introducing evidence may shift from one side to the other during the course of a trial, but from the beginning to the end the burden of proof never shifts, and it remains on the state to establish her case. This burden which rests on the state is sustained in the first instance by the presumption which the law raises that every man is sane. So long as this presumption remains un rebutted, the state has proved beyond a reasonable doubt the sanity of the defendant and his capacity to commit crime: *Ford v. State*, 73 Miss. 734. This presumption of fact stands for full and express proof of sanity until the contrary is shown: *Commonwealth v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689. This presumption is conclusive until some evidence is introduced by the defendant to establish his insanity. The burden of introducing evidence then shifts to the defendant, and evidence must be introduced to overcome this presumption. The initiative in presenting the evidence is taken by the defense, it is true, but the burden of proof upon this part of the case, as well as upon every other, is upon the prosecution to establish the conditions of guilt: *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154. If no evidence is introduced by the defendant, the authorities agree that the burden upon the state to prove beyond a reasonable doubt the capacity to commit crime is performed; the legal presumption of sanity prevails. The conflict among the decisions arises only when the defendant introduces

some evidence to show insanity. The question, then, is, How much evidence must the defendant introduce in order to overthrow this presumption, for as long as it stands the defendant's sanity is fully established? Must the evidence given for the accused establish his insanity beyond a reasonable doubt before the conclusiveness of the presumption is affected? Or must the evidence introduced on behalf of the defendant prove his insanity by a preponderance of the evidence? Or is it sufficient that the defendant's evidence shall raise in the minds of the jurymen a reasonable doubt as to whether the accused is sane or insane? In any case the problem is, How much evidence is necessary to overthrow the presumption of sanity, which, in the absence of any evidence, is proof beyond a reasonable doubt of the sanity of the defendant?

We have already seen that, with the possible exception of Louisiana, the accused is not required to establish his insanity beyond a reasonable doubt. The general rule, established by the weight of authority is that insanity is a defense, the burden of proving which rests upon him who asserts it, and that the defendant is obliged to establish his insane condition at the time of the commission of the crime by a preponderance of evidence: *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Commonwealth v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *Lovegrove v. State*, 31 Tex. Cr. Rep. 491; *State v. Jones*, 64 Iowa, 349; *Moore v. Commonwealth*, 92 Ky. 630. We have already intimated that this rule is not, logically, the correct one, since a reasonable doubt as to the existence of the conditions of guilt (which include a mind sane enough to be capable of committing crime) must of necessity lead to an acquittal. The attitude of the courts which occupy this position is this, however: Soundness of mind is the natural and normal condition of men. Insanity is a condition so abnormal that it should positively appear; and it is a fact so contrary to the course of nature that a reasonable mind cannot believe it unless the evidence which goes to establish it is satisfactory, and not merely doubtful. Therefore a preponderance of evidence is requisite in order to satisfactorily establish insanity: *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Ortwein v. Commonwealth*, 76 Pa. St. 414, 18 Am. Rep. 420.

A more practical reason for the rule, however, which is very frequently given as showing why it should be adhered to, is that insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence: *Baccigalupo v. Commonwealth*, 33 Gratt. 807, 36 Am. Rep. 795; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *People v. Dennis*, 39 Cal. 625.

There seems to be a difference in the cases as to what will really constitute a preponderance of the evidence. In South Carolina, for example, only such a preponderance of evidence is necessary as will satisfy the jury that the criminal charge is not sustained by the

state beyond a reasonable doubt: *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *State v. Paulk*, 18 S. C. 514. This rule approaches the other rule that if the jury have a reasonable doubt as to the defendant's insanity they must acquit. In Pennsylvania, the defendant's evidence is required to be fairly preponderating; it need not be conclusive: *Commonwealth v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689; *Lynch v. Commonwealth*, 77 Pa. St. 205; *Commonwealth v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625. In *Coyle v. Commonwealth*, 100 Pa. St. 573, 45 Am. Rep. 397, it was said that evidence need not be clearly preponderating, as this was demanding too high a degree of proof. And this seems to be the general rule, that the evidence need only be fairly preponderating: See *Casat v. State*, 40 Ark. 511. In *People v. Pico*, 62 Cal. 50, it was held that the defendant was entitled to every reasonable doubt in all matters except that of insanity.

As already noticed, there are courts which hold that the conclusiveness of the presumption of sanity is overthrown by the defendant when he has raised in the minds of the jury a reasonable doubt as to his sanity. When sufficient evidence to produce this effect has been introduced, the defendant's sanity (which is one of the conditions essential to establish guilt) is not proved beyond a reasonable doubt, and further proof is necessary or the jury must acquit. The reasonable doubt must be raised, but it is immaterial whether it is from evidence introduced by the defendant or by the prosecution: *Montag v. People*, 141 Ill. 75. This doctrine which authorizes acquittal, if the jury have a reasonable doubt respecting the defendant's sanity has sometimes been termed the American rule, as it seems not to have been advanced elsewhere than in this country. While logically it is the correct rule, as we have previously shown, it lacks the support of the weight of authority. We have already cited a large number of authorities which uphold this doctrine.

In conclusion, then, the rule may be summarized thus: The burden of proof never shifts, the onus being always on the prosecution to establish every fact essential to constitute the crime, a mind sufficiently sane to be capable of committing crime being one of these facts. That this burden of proving sanity is in the first instance sufficiently borne, and sanity is established, by the legal presumption that all men are sane. That to overcome this presumption the defendant must introduce evidence to establish his insanity. In some jurisdictions, this burden of introducing evidence, which is shifted to the defendant, is performed if the defendant raises a doubt as to his insanity. In others the defendant must prove insanity by a preponderance of the evidence. In perhaps one jurisdiction he must prove his insanity beyond a reasonable doubt. In all, however, the burden is on the state to prove the conditions of guilt, the only doubt being as to how much evidence is necessary to overthrow the original proof of sanity which is established by a presumption.

TIDBALL v. YOUNG.

[58 NEBRASKA, 261.]

EXECUTORS AND ADMINISTRATORS—BONDS.—An instrument purporting to be an administrator's bond, which is signed by the principal and sureties and approved and filed by the probate court, but which names no person or officer as obligee, is neither a statutory nor a common-law bond. It is simply a promise in writing made to no one, and is void.

F. I. Foss and W. R. Matson, for the plaintiffs in error.

E. S. Abbott, for the defendants in error.

²⁶¹ RAGAN, C. Jarett Young died in Saline county, Nebraska, leaving a will, which was duly admitted to probate, and one Boomgarden qualified therefor and was appointed executor of Young's estate. Subsequently, Boomgarden resigned and one George D. Stevens was appointed administrator with the will annexed. For the faithful performance of his duties as such administrator Stevens, as principal, and one Band and one Bridges, as sureties, executed and filed with the probate court of said county a writing, denominated in this record a "bond," which was duly approved as the bond of said Stevens as administrator with the will annexed by said probate court. Stevens' authority as administrator with the will annexed was extinguished by an order of the probate court removing him as such administrator and Isaac N. Young was appointed administrator instead, who duly qualified by giving his bond and accepting the trust. He then ²⁶² brought this suit in the district court of Saline county against Stevens as principal and Band and Bridges as sureties to recover the value of certain personal property belonging to the Jarett Young estate, which it is alleged Stevens, while he was administrator with the will annexed, took possession of and converted to his own use, or at least had neglected and refused to account for and turn over to the present administrator. Young, administrator, based this action on the bond which it is alleged that Stevens as principal and Band and Bridges as sureties executed and filed in the probate court at the time Stevens was appointed administrator with the will annexed. It seems that during the pendency of this action Stevens died; at any rate, his death was suggested, and his administrator, John L. Tidball, was made defendant to this action in place of Stevens, deceased. The trial in the district

court resulted in a judgment in favor of Young, administrator, against Tidball, administrator of Stevens' estate, and against Band and Bridges, to review which the parties below have filed here a petition in error.

The writing or paper sued on here as a bond executed by Stevens as principal and Band and Bridges as sureties, so far as material here, is as follows: "Know all men by these presents, that we, George D. Stevens, as principal, and Charles Band and W. A. Bridges, as sureties, all of the county of Saline and the state of Nebraska, are held and firmly bound in the penal sum of four thousand dollars, lawful money of the United States, well and truly to pay we bind ourselves, our heirs, executors, administrators, and assigns, and each of them, firmly by these presents." It is to be observed that this so-called bond is without an obligee. Nowhere in the bond is any person mentioned as an obligee, nor is there any blank left in the bond for the filling in of the name of an obligee. The bond simply recites that the principal and sureties are held and firmly bound in a certain sum of money, to pay which they bind themselves. The bond recites that ²⁰³ Stevens had been appointed administrator with the will annexed of the estate of Jarett Young, deceased, and then recites generally that if Stevens, as such administrator, shall perform his duties, the obligation shall be null and void; otherwise remain in full force and effect. Section 311, chapter 23, of the Compiled Statutes provides: "All bonds required by law to be taken in or by order of the probate court shall be for such sum and with such sureties as the judge of probate shall direct, except when the law otherwise prescribes; and such bonds shall be for the security and benefit of all persons interested, and shall be taken to the judge of probate, except where they are required by law to be taken to the adverse party." Section 179 of said chapter provides: "Every administrator, before he enters upon the execution of his trust and before letters of administration shall be granted to him, shall give a bond to the judge of probate," etc. An essential thing in every administrator's bond is an obligee. The promise of the principal and sureties signing such an instrument must be made to some person or officer. The instrument on which this action is based does not comply with the statute. It is not the bond which the statute requires an administrator to give. It is neither good as a statutory bond nor as a common-law bond. It is a promise in writing made to no one. It is simply void. *Sacra v. Hudson*, 59 Tex. 207, was a suit on

a paper alleged to be a guardian's bond, and in the alleged bond no one was named as obligee, although the bond recited that the principal and sureties "are held and firmly bound unto —," and the court held that this instrument was not a good guardian's bond, either under the statute or at common law, and that a suit could not be maintained thereon, because no one was named in the bond as obligee. The court said: "It is the duty of courts to construe and enforce contracts. To make contracts for parties is something quite beyond their province. . . . None of the cases go to the length of supplying necessary parties to bonds. If the ²⁶⁴ name of the obligee may be omitted without affecting the validity of the bond, why may not the amount of the bond also be left blank? By the same reasoning, why may not both the amount and the payee be omitted? Or the signature of the principal and the sureties be dispensed with?"

It may be that the county judge who accepted and approved this writing as the bond of Stevens, administrator, may be liable upon his bond to the present administrator of the Young estate, if the latter estate has been prejudiced by the negligence of such county judge. But this we do not decide. It may be that if Stevens, during his lifetime, and while pretending to act as administrator for Young's estate, obtained possession of and converted to his own use the assets of that estate, the Stevens estate is now liable to the Young estate therefor. But no one is liable to the Young estate on this instrument alleged to be the bond of Stevens, administrator. The instrument made the basis of this suit is alleged to be a bond and contract of the parties who signed it. It is not a contract. It is an imperfect and unfinished instrument in writing, and no action can be maintained thereon. The judgment of the district court is reversed and the cause remanded.

AN ADMINISTRATOR'S BOND, purporting to be the joint obligation of the principal and the sureties, and the several obligation of the latter, which is not signed by the principal, though letters of administration are issued to him thereon, is void: *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46, and note.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v.
WESTERHOFF.

[58 NEBRASKA, 379.]

MORTGAGES—ACCELERATED MATURITY—FORECLOSURE.—The provisions in a note and mortgage that, for any default in the payment of the installments of principal or interest, the entire indebtedness shall become due and collectible at once, is not a forfeiture, and will be enforced as the proper contract of the parties.

MORTGAGES—INTEREST COUPONS—PENALTY.—Where the interest to be paid for the use of a principal sum is definitely fixed by the terms of a note and mortgage, the installments of interest being evidenced by coupons, and an additional rate of interest on the entire debt is provided in case of default in the payment of the interest coupons, such additional interest is in the nature of a penalty, and will not be enforced.

INTEREST—AMOUNT INCLUDED IN DECREE.—In Nebraska, when a contract provides for an interest rate of less than seven per cent per annum, a decree based upon such contract will bear interest at seven per cent. While a decree based upon a contract which provides for a legal rate of interest of more than seven per cent will bear the rate of interest stipulated in the contract.

Samuel J. Tuttle, for the appellant.

E. C. Biggs and J. J. Thomas, for the appellees.

379 HARRISON, C. J. On April 2, 1894, the appellee John Westerhoff and his wife executed and delivered to the appellant a promissory ³⁸⁰ note in the sum of eighteen hundred dollars, payable five years after date, to bear interest at the rate of six per cent per annum, payable semi-annually. The note had attached to it ten coupons, each of which evidenced the indebtedness of the makers of the principal note for an installment of the interest which was to become due thereon. In the principal note appeared this sentence: "This note to draw nine per cent interest per annum after default in payment of principal or interest," and in each coupon there was the statement that "This note bears interest at nine per cent after due." To secure the payment of the note and interest there was made and delivered a mortgage on a piece of real estate, and in the mortgage was embodied the following provision: "And it is agreed that if default shall be made in the payment of the said notes, or any part of the interest thereon, promptly as they mature, . . . then all of the said notes, and the whole of the indebtedness secured by this mortgage, . . . shall become due and collectible at once, by foreclosure or otherwise, and without no-

tice of broken conditions. . . . And it is hereby agreed that after any default in the payment of the principal or interest, the whole indebtedness secured by this mortgage shall draw interest at the rate of nine per cent per annum." It appears that the note was executed for the amount of a loan made by the appellant to John Westerhoff, one of the appellees, that the agreed rate of interest of the loan was seven per cent per annum, of which one per cent per annum for the time of the loan, or ninety dollars, was collected at the time of the inception of the loan. The appellant commenced this action in the district court of Seward county on April 17, 1895, and alleged for cause that there had been default in payment of each of the two first installments of interest due on the note, whereby the whole indebtedness had become due and the conditions of the mortgage had been broken. A foreclosure was asked and the allowance of interest at the rate of nine per cent per annum on the whole sum from the date of the first default. In the ³⁸¹ answer of the appellees, the Westerhoffs, the execution and delivery of the notes and mortgages were admitted, and it was pleaded that at a date subsequent to the maturity of the first interest coupon the amount thereof, with nine per cent per annum from its maturity, also the amount of the second coupon to become due, was tendered to the appellant; that of such tender there was a refusal; that like tender was made at a later date, but was refused, as was a third and still later one. These tenders were to different parties and at different places. The district court, on trial, dismissed the action and the mortgagee has appealed.

There are but two main questions presented in the appeal, viz.: 1. Was the appellant entitled to enforce the note and mortgage as past due because of the default in the payment of the interest; and in this connection was there evidence of the default or a lack thereof? 2. If entitled to foreclosure, should the decree be for nine per cent per annum from the date of the default in payment of the interest coupon?

Of the latter branch of the first question it must be said that in the answer there were statements which in effect constituted an admission of the failure to pay the amount of the first coupon at its maturity, and, as to the first and main point of that question, that it is well established that for any default in the payment of the installments of principal or interest provided in a note and mortgage, or either, the further provision of the accelerated maturity of the debt or portions thereof is not a forfeiture and may and will be enforced as the allowable contract

of the parties: *Pope v. Hooper*, 6 Neb. 178; *Lowenstein v. Phelan*, 17 Neb. 430; *Morling v. Bronson*, 37 Neb. 608; *Eastern Banking Co. v. Seeley*, 55 Neb. 660; *Pomeroy's Equity Jurisprudence*, sec. 439; *Wheeler v. Howard*, 28 Fed. Rep. 741; *Whitcher v. Webb*, 44 Cal. 127. And the tender of the overdue interest after the default did not deprive the mortgagee of his right of foreclosure: *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261.

³⁸² In regard to the second question, it must be said that the portions of both note and mortgage (in them there was coincidence) in which it was provided that on default in payment of either principal or interest the whole sum due should bear interest at nine per cent per annum, which was coupled with a further provision in the mortgage that in the event of such default the whole debt should become due and collectible, attached something additional to the amount which was to be paid for the use of the principal sum, not because of any default directly in its payment, but for default in payment of a sum or the sums to be given for its use. The amounts to be paid for the use of the principal sum had been definitely fixed and set forth in terms in both note and mortgage, and the additional amount to be borne because of default in payment of interest was within the principle approved by this court in *Upton v. O'Donahue*, 32 Neb. 565, and *Hallam v. Telleren*, 55 Neb. 255, of the nature of a penalty, and will not be enforced.

It follows from what has been said that the judgment of the district court will be reversed and the cause remanded to that court with instructions to enter a decree of foreclosure for the amount of the note and mortgage and interest at six per cent per annum from the commencement of the action—this portion of the decree to bear interest at seven per cent per annum; also for the amount due on interest coupons with interest at nine per cent per annum from the defaults in payments, and interest at the same rate on this branch of the decree.

ON MOTION FOR REHEARING.

HARRISON, C. J. The adjudication by the district court of Seward county of the matters of litigation in this, an action of foreclosure of a real estate mortgage, was appealed to this court and submitted; and in an opinion reported in 58 Neb. 379, ante, p. 101, there was set forth the decisions of the questions ³⁸³ presented. A motion for a rehearing was filed, which is now pending. In one ground of the motion there is complaint of

the portion of the opinion in which it was determined that the appellant was not entitled to nine per centum per annum interest on the principal of the debt secured by the mortgage from a maturity of it, which became of existence by reason of a failure to pay an installment of interest (for the provisions of the note and mortgage relative to interest, maturity of principal, and other facts, see the opinion to which we have referred), and it has been suggested that we have in the determination of this point announced a doctrine in conflict with that established by some of the late decisions of this court, and have returned to the doctrine on this subject of *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633, which was overruled in *Havemeyer v. Paul*, 45 Neb. 373, wherein it was held: "Where a note provides for a lawful rate of interest from date until maturity, and a higher and lawful rate of interest afterward, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date, within the meaning of section 3, chapter 44, of the Compiled Statutes of 1893. First point of the syllabus in *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633, overruled." To the same effect see *Omaha Loan etc. Co. v. Hanson*, 46 Neb. 870; *Omaha Fire Ins. Co. v. Fitch*, 52 Neb. 88; *Crapo v. Hefner*, 53 Neb. 251. In the cases to which we have just referred, commencing with *Havemeyer v. Paul*, 45 Neb. 373, the sum of money loaned bore interest at a specified rate from the time loaned until its definitely fixed maturity; and it was provided in the contract of the parties that if the principal sum was not paid at its stated fixed maturity it should draw interest at an increased rate; or the lender said to the borrower, "You will pay me a designated rate of interest to a certain named date on this money, and if you do not then pay it to me, for the time subsequent which you keep it you ³⁸⁴ must pay for its use an increased rate of interest," and to this the borrower acceded, and this it was held is enforceable. In the case at bar a different question arises. It was not because the fixed date for payment of the principal had arrived, and default had been made, that the holder of the evidence of the indebtedness and its security sought relief under them, and for an increased rate of interest as provided in the contract, but it was by reason of the non-payment at the time agreed upon, and prior to the designated maturity of the principal, of an installment of the amount to be paid for the use of the principal and by which default the

lender might claim a maturity—an accelerated maturity—of the principal, and collect the amount contracted to be paid for the use of the money increased by a further sum, added, not because of a failure to pay the principal when it was due, and for its further use or forbearance, but because of the failure to pay a stated portion of the sum due for the use of the principal. This is in the nature of a penalty for nonpayment of the installment of interest, and not an amount paid as per contract for the use of the money borrowed. This is not in conflict with the doctrine of the cases to which we have alluded, nor is it a return to the discarded rule of *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633. In the opinion we stated: "It follows from what has been said that the judgment of the district court will be reversed, and the cause remanded to that court, with instructions to enter a decree of foreclosure for the amount of the note and mortgage and interest at six per cent per annum from the commencement of the action—this portion of the decree to bear interest at seven per cent per annum; also for the amount due on interest coupons with interest at nine per cent per annum from the defaults in payments, and interest at the same rate on this branch of the decree": *Connecticut Mut. Life Ins. Co. v. Westerhoff*, 58 Neb. 382, ante, p. 103. This should be modified to read after the word "action": "To the date of the original contract maturity of the debt, and thereafter ³⁸⁵ the interest on the debt to date of decree and on the decree to be at nine per centum per annum; to be included in the decree the amount due on coupons with interest from the maturity of each at nine per centum per annum."

Reversed and remanded.

MORTGAGES—ACCELERATED MATURITY.—A stipulation in a mortgage providing that the whole debt secured thereby shall become due and payable upon a failure to pay the interest annually is a legal and valid stipulation, and not in the nature of a penalty or forfeiture: *Schooley v. Romain*, 31 Md. 574, 100 Am. Dec. 87.

INTEREST.—STIPULATIONS TO PAY A HIGHER RATE of interest in the event of the principal debt not being paid at maturity are treated in the extended notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 192, 193; *Horn v. Nash*, 63 Am. Dec. 438-440. See, also, *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633.

INTEREST ON JUDGMENTS.—If a creditor upon a breach of a contract elects to merge it in a judgment, interest as agreed upon by the parties ceases, and the judgment bears such interest as is prescribed by law: *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. Rep. 935.

HAMMOND v. CHAMBERLAIN BANKING HOUSE.

[58 NEBRASKA, 445.]

JUDICIAL SALES—PURCHASERS—PRIOR LIENS.—THE RULE OF CAVEAT EMPTOR applies to judicial sales, and, in the absence of special circumstances, a purchaser cannot enjoin the enforcement of a prior lien on the property of which he was ignorant at the time he acquired his title.

JUDICIAL SALES.—A PURCHASER at a foreclosure sale cannot be released from his bid, although it was made under a mistake resulting from unwarranted overconfidence in representations of the officer making the sale.

JUDICIAL SALES—PRIOR LIENS—REMEDY OF PURCHASER.—The remedy of a purchaser at a judicial sale, who acquires knowledge of a prior lien on the property before the order of confirmation is entered, is to make application to the court to be released from his bid.

Daniel F. Osgood, for the appellant.

M. B. C. True, for the appellee.

446 SULLIVAN, J. This suit was commenced by the appellant to obtain a perpetual injunction against a threatened execution sale of eighty acres of his real estate in Johnson county. The property was originally owned by George Goracke, for the satisfaction of whose debts it was regularly sold to Hammond by the sheriff, acting under valid orders of sale issued out of the district court in certain actions wherein the Chamberlain Banking House and others were plaintiffs and Goracke was defendant. Prior to the lien of the judgments on which the orders of sale issued, were a mortgage in favor of the Tecumseh National Bank, a judgment for about one hundred dollars in favor of the Chamberlain Banking House recovered in 1893, a judgment in favor of W. B. Compton recovered in 1894, and the taxes due for the last-named year. The theory of Hammond is that the land was, with the authority and consent of the Chamberlain Banking House, sold subject only to the lien of the mortgage and taxes. The question for decision is one of fact. There is some conflict in the evidence, but the trial court was undoubtedly right in finding the issues in favor of the defendants. The sheriff announced at the sale that the property would be sold subject to the mortgage and the taxes, but he did not declare that those were the only prior liens. Hammond may have put that construction upon the language used and may have acted on a false assump-

tion in making his bid, but that was his fault; and he certainly cannot allege his own palpable negligence as a ground for relief in an original action. It has been even held that a purchaser at a ⁴⁴⁷ foreclosure sale could not be released from his bid although it was made under a mistake resulting from an unwarranted overconfidence in representations of the officer making the sale: *Norton v. Nebraska Loan etc. Co.*, 35 Neb. 466, 37 Am. St. Rep. 441; on rehearing, 40 Neb. 394. Whatever may be said of the doctrine of the *Norton* case, it is entirely clear that in the case at bar there was no circumstance which deterred or forbade the appellant from exercising for his own protection that reasonable caution and vigilance which the rule of caveat emptor exacts of those who purchase property at judicial sales. He should have acquainted himself with the condition of the title in which he was about to invest his money. He should not have relied upon the sheriff's statement nor on his own inference from the fact stated. That the representative of the Chamberlain Banking House neither authorized nor knew of the special announcement made by the sheriff is pretty conclusively established. It is also proven quite satisfactorily that Hammond's attorney had actual knowledge of the prior judgment before the order of confirmation was entered. This being so, he should have resisted confirmation and asked to be released from his bid. This was a plain and adequate remedy, and, under the circumstances, it was the only remedy available. The judgment is obviously right and is affirmed.

JUDICIAL SALES.—THE RULE OF CAVEAT EMPTOR applies to one who purchases real estate at a judicial sale: *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703. The fact that the sheriff and clerk of the court represented to a purchaser that he would obtain a perfect title and thus induced him to bid, does not entitle him to have the sale set aside on proof that the land is subject to a paramount lien and that he and they were mistaken in believing that the sale would cut out such lien, when none of the parties to the action united in or knew of such representation: *Norton v. Nebraska Loan etc. Co.*, 35 Neb. 466, 37 Am. St. Rep. 441. Compare *Hammond v. Cailleau*, 111 Cal. 206, 52 Am. St. Rep. 167.

JUDICIAL SALES—RELIEF OF PURCHASER.—After the confirmation of a judicial sale, objection by a purchaser to a defect in title comes too late: his relief is to be obtained by resisting the confirmation: See the extended note to *Burns v. Hamilton*, 70 Am. Dec. 579.

CHADRON LOAN AND BUILDING ASSOCIATION v. SMITH.

[58 NEBRASKA, 469.]

HOMESTEAD—MORTGAGE FORECLOSURE—APPOINTMENT OF RECEIVER.—While, under some circumstances, a receiver may be appointed, in an action to foreclose a mortgage, though the property is a homestead, yet under a statute which declares that the homestead right is subject to be disturbed only through some voluntary act of the parties who might be entitled to it, and then alone by execution or forced sale, a mortgagor cannot be deprived of the enjoyment of his homestead right by the appointment of a receiver.

Albert W. Crites, for the appellant.

Allen G. Fisher, for the appellee.

469 HARRISON, C. J. In an action of foreclosure for the association in the district court of Dawes county there was a decree in its favor on August 18, 1896, by which there was subjected to sale to apply in satisfaction of its mortgage lien thereon two nonadjacent lots in the city of Chadron, on each of which there was a dwelling-house, one of which was occupied by Jessie Smith and was her statutory homestead. She was the owner of both lots which were included in the mortgage and decree of foreclosure. Within the proper time she filed a request for stay of the execution of the decree, and soon thereafter for the association there was presented an application for the appointment of a receiver to take charge of the properties and collect the rents thereof. On hearing, the court appointed a receiver for the one lot, but refused to make any **470** appointment applicable to the homestead. The association has appealed to this court, and in the appeal proceedings has also presented an original application for the appointment of a receiver. The transcript was filed in this court November 19, 1896, and the bill of exceptions on the 30th of the same month. The transcript was accompanied by the application to this court for a receiver. On this application there was a hearing and on January 8, 1897, it was denied.

In the brief which was filed November 30, 1896, it was urged that this court should abandon the rule established in the opinion in the case of *Eastman v. Cain*, 45 Neb. 48, that applications similar to the one in this matter at bar should ordinarily be first made to the district courts wherein the actions were instituted. In the decision of the application herein to

this court we again considered the advisability and propriety of the directions in regard to practice stated in *Eastman v. Cain*, 45 Neb. 48, and with approval. We may add that in any such case, if an appeal is taken from the order of the district court in the matter of the application for a receiver, the proceeding in this court will, on motion, be advanced for hearing and thus delay be avoided.

It was shown that the lot as to which the petition for a receiver was denied was the homestead of the mortgagor. For the association there was proof that the property was probably insufficient to discharge the mortgage debt, also that repairs were greatly needed and were not being made, that the taxes had not been paid, and the property had been sold for the delinquent taxes. On the established facts there was quite a strong showing for the relief asked—the appointment of a receiver to collect the rents of the mortgaged property. One of the main questions presented was, Will a homestead, under the ordinary or any facts and circumstances, be placed in the possession and care of a receiver? It is stated in *Waples on Homestead and Exemptions*, 719, 720: “Under some circumstances, a receiver may be appointed, in an action ⁴⁷¹ to foreclose a mortgage, though the property is a homestead. It may be hotel property about to be diminished in value by being closed, so that such appointment would be advisable. The court has equitable jurisdiction to make the appointment when its exercise becomes necessary to protect the rights of a mortgagee not resting on the common-law principle of a legal estate transferred to him by the mortgage. In an action for forcible detainer, in which the defendant claimed homestead, a receiver was appointed. But it is questionable whether it is ever proper to take possession of a mortgagor’s homestead while proceedings to foreclose are pending. Certainly, it is not proper practice, as a general rule. An application for such an appointment should always be refused when the amount of the mortgage debt is the subject of contention in the case”: See, also, *Beach on Receivers*, sec. 546. In the decision of the case of *Lowell v. Doe*, 44 Minn. 144, without an extended discussion of the subject or lengthy statement of reasons for it, the rule was announced as follows: “The homestead rights . . . in the mortgaged property are subject to the ordinary legal and equitable rights of the mortgagees as such.” It is also observed that the sufficient answer to the assertion that possession of homestead in property may not be disturbed by the appointment of a receiver is:

"That by the terms of the homestead law (Gen. Stats. 1873, c. 68, sec. 2) the homestead exemption 'shall not extend to any mortgage thereon lawfully obtained.' The homestead rights of the mortgagor are subject to the ordinary legal and equitable rights of the mortgagee in respect to the mortgaged premises which may be enforced by the appropriate remedies." In our state the legislature saw fit, and it is a wise and politic provision much to be commended, to exempt from judgment liens and execution or forced sale the homestead, and have made no exceptions from the absolute character of the exemption save and only as follows: "The homestead is subject to execution or forced sale in satisfaction of judgments ⁴⁷² obtained: 1. On debts secured by mechanics', laborers', or vendors' liens upon the premises; 2. On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant": Comp. Stats., c. 36, sec. 3. The legislature is frequently said to be the body or branch of the government nearest the people, and is sovereign and exclusive in its sphere, that of law-making, and it is not for the courts to infringe upon the domain of the legislative power. The homestead right was made subject to be disturbed only through some voluntary act of the parties who might be entitled to it, and then alone by execution or forced sale. This clearly does not contemplate the deprivation of the enjoyment of the homestead right by or through the appointment of a receiver, and we cannot extend what the law-makers have said, and read into the law the incidental remedies which accompany mortgage liens ordinarily or in general. Any invasion of the homestead right will not be extended beyond the fair, direct import of the enactment by which it may be sought to make it less absolute. It follows that the district court was right and its decree is affirmed.

Norval, J., expressed no opinion.

MORTGAGED HOMESTEAD—RECEIVER FOR.—There is some question as to whether, in any case, a receiver should be appointed to take possession and charge of a mortgagor's homestead, pending proceedings to foreclose: See the extended note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 79.

HOME FIRE INSURANCE COMPANY v. KUHLMAN.

[58 NEBRASKA, 488.]

INSURANCE—FIRE—UNOCCUPIED BUILDING.—Under a fire insurance policy providing that it shall be null “if the building be or become vacant or unoccupied and so remain for ten days,” the fact of vacancy does not per se annul the contract, but merely gives the insurer the right to treat it as void, which right may be waived.

INSURANCE—FORFEITURE OF POLICY—WAIVER.—Where there has been a breach of a condition in an insurance policy providing for a forfeiture, a waiver of such breach when once made is irrevocable, and the waiver, to be effective, need not be based on either a new agreement or an estoppel.

INSURANCE—POWER OF AGENT—WAIVER OF FORFEITURE.—The election of an insurance agent, acting within the scope of his authority, to waive the right of the insurance company to take advantage of a forfeiture, is binding upon the company.

INSURANCE—FORFEITURE OF POLICY—RENEWAL.—If an insurer claims a forfeiture of an insurance policy by reason of a breach of the contract, the policy ceases to exist, and cannot be reanimated except by the mutual consent of the contracting parties.

INSURANCE—FORFEITURE OF POLICY—UNEARNED PREMIUM.—If an insurer takes advantage of a forfeiture of an insurance policy, there is no unearned premium which the insured is entitled to receive.

INSURANCE—EVIDENCE OF DAMAGE.—In an action upon an insurance policy, evidence tending to show the cost of putting a building in good condition immediately before the fire is inadmissible upon the question as to the damage caused by the fire.

APPEAL—REVERSAL FOR EXCESSIVE DAMAGES.—Although the damages awarded by a jury are large, yet if they are well within the estimates of competent witnesses, the judgment will not be reversed.

Greene & Breckenridge, for the plaintiff in error.

Lee S. Estelle, for the defendant in error.

489 SULLIVAN, J. In the district court for Douglas county Elizabeth Kuhlman recovered a judgment against the Home Fire Insurance Company in an action on a policy of fire insurance covering a two-story frame building located in the city of Omaha. The policy provided that it should be null “if the building be or become vacant or unoccupied and so remain for ten days.” The building did become vacant and so remained for more than thirty days before April 11, 1893, the date of the fire by which it was damaged. The company insists that the judgment against it should be reversed because the policy had been forfeited and was not in force when the

fire occurred. While conceding that there had been a breach of the condition against nonoccupancy, counsel for plaintiff contends that the right to declare a forfeiture had not been exercised, but had been voluntarily relinquished by the defendant acting through Mr. Charles J. Barber, its secretary ⁴⁹⁰ and general manager. This defense was properly pleaded and the evidence justified its submission to the jury. Under our decisions the fact of vacancy did not per se annul the contract, but merely gave to the company the right to treat it as void: *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Eagle Fire Co. v. Globe Loan etc. Co.*, 44 Neb. 380; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395. The defendant, on being informed that the insured property had been vacant for more than ten days, might decline to take advantage of the forfeiture, and in that event the policy would remain in force. The election to waive being once made it would be irrevocable. It could not be recalled: *Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240. The contention that a waiver must have the elements of an estoppel in cases of this kind cannot be sustained. "It is," says Sutherland, J., in *People v. Manhattan Co.*, 9 Wend. 381, "a technical doctrine introduced and applied by courts for the purpose of defeating forfeitures." In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, it was held that an affective waiver need not be based on either a new agreement or an estoppel. Substantially the same holding was made in *Hollis v. State Ins. Co.*, 65 Iowa, 454; and such is now the settled doctrine of this court: *Billings v. German Ins. Co.*, 34 Neb. 502; *Eagle Fire Co. v. Globe Loan etc. Co.*, 44 Neb. 380. The material inquiry, then, upon this branch of the case is whether the defendant elected to exercise or to waive its right to take advantage of the forfeiture. The intention of the agent was, of course, the intention of the corporate principal. The decision of Mr. Barber was the decision of the company. Did he, upon being advised of the broken condition, determine to treat the policy as being without force or vitality from the time of the breach, or did he purposely forego this privilege? The fire occurred on April 11th, and on or before April 13th the company was informed of the fact and caused an estimate of the loss to be made. To the plaintiff, who resided in San Francisco, the following letter was sent on the day of its date:

491 "Omaha, April 13, 1893.

"Mrs. Elizabeth Kuhlman, No. 873 Mission Street, San Francisco, Cal.

"Dear Madam: We herewith inclose bank draft for \$3.90, being in full of return premium under policy No. 65008, issued by the Home Fire Insurance Company to you on May 23d last for \$1,000, on building located at No. 920 Douglas street, Omaha, Nebraska, said policy being this day canceled on our books, and our liability terminated thereunder from and after this date. We have this day tendered Mr. W. E. Rhodes, your agent at the U. S. National Bank, this city, \$3.90 cash, in cancellation of said policy. Our object in canceling this policy is that it has just come to our notice that the city authorities some time since condemned and ordered said building to be torn down. We also are just in receipt of information that the building has been vacant for some time. Please sign and return the inclosed receipt, and oblige,

"Yours truly,

"CHAS. J. BARBER,

"Sec'y."

This letter was certainly competent evidence of a waiver, and the trial court did not err in so informing the jury. It shows action on the part of the company altogether inconsistent with an election to treat the policy as having been previously invalidated. It was written for the express purpose of terminating the contract and on the assumption that the contract was then in full force and effect. It indicates that the company was then seeking to put an end to a valid and subsisting contract of insurance, not because of any act or omission of the owner of the insured property, but because of some action taken by the city authorities concerning it. Undoubtedly, the jury might find that the defendant had forborne to claim a forfeiture from the fact that on April 13th it considered the policy in force and was taking affirmative action to destroy its vitality. Other letters written by Mr. Barber to the plaintiff give strong support to the hypothesis of a waiver. He said in a letter written May 22d that the policy would be canceled from the date that ⁴⁹² plaintiff received the draft for three dollars and ninety cents. He also assured her that she could not avoid a cancellation of the policy, and that it had been canceled and was void from the time she signed the receipt for registered letter containing the draft. "The cancellation," he con-

tinued, "does not date beyond the receipt by you of our registered letter containing the remittance, but simply terminates any liability accruing from and after that date. . . . The three dollars and ninety cents," he added, "belongs to you and is the unearned premium on the said mentioned policy, which is canceled and void as to any accruing liability thereunder" after the letter of April 13th was received. On July 31st Mr. Barber again wrote to the plaintiff urging her to accept the three dollars and ninety cents unearned premium, saying that it belonged to her and that the policy was not in force after the receipt by her of the company's draft in April. From the statements contained in these letters it is clear that the defendant considered the policy in force until the draft for three dollars and ninety cents reached the plaintiff at San Francisco. There is also, perhaps, in the evidence ground for an inference that the premium was considered as earned, and that it was retained, up to the 17th of April. In *Eagle Fire Co. v. Globe Loan etc. Co.*, 44 Neb. 380, the insurer, with knowledge of the loss, canceled its policy, the cancellation taking effect from and after the date of the loss, and it repaid to the assured the unearned premium for carrying the risk from and after the date of the loss until the expiration of the policy according to its terms. This circumstance, it is said in the opinion, "was evidence which tended very strongly to show that the insurance company at that time recognized the policy as being in force up to and including the day that the loss sued for occurred." The loss occurred November 9th, and on November 24th the insurer repaid the unearned premium from November 10th. Concerning this it was said that the assured "having violated the policy by procuring additional insurance thereon without the knowledge and consent of the insurer, it was entitled, on discovering such ⁴⁹³ violation, to cancel the policy by reason thereof, such cancellation to take effect from and after the date of its violation." So, in this case the defendant had a right, on being informed that a condition of the policy had been broken, to treat the policy as of no effect from the date of the breach. If there was a forfeiture of which the defendant had taken advantage, then there was no contract to cancel, for it had already ceased to exist. It was dead and could not be reanimated except by mutual consent of the contracting parties: *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *New v. German Ins. Co.*, 5 Ind. App. 82; *Boyd v. Insurance Co.*, 90 Tenn. 212, 25 Am. St. Rep. 676; *Baldwin*

v. German Ins. Co., 105 Iowa, 379; Ferree v. Oxford Fire etc. Ins. Co., 67 Pa. St. 373, 5 Am. Rep. 436; Ostrander on Fire Insurance, 2d ed., sec. 342. And if the company had taken advantage of the forfeiture, there was no unearned premium which the plaintiff was entitled to receive: Farmers' Mut. Ins. Co. v. Home Fire Ins. Co., 54 Neb. 740; Collins v. St. Paul Fire etc. Ins. Co., 44 Minn. 440; Baldwin v. German Ins. Co., 105 Iowa, 379; Jackson v. Millspaugh, 103 Ala. 175; Phoenix Ins. Co. v. Stevenson, 78 Ky. 150; Johnson v. American Ins. Co., 41 Minn. 396; Colby v. Cedar Rapids Ins. Co., 66 Iowa, 577. If the defendant had not waived its right to claim a forfeiture, it is, as was said in Eagle Fire Ins. Co. v. Globe Loan etc. Co., 44 Neb. 380, difficult to understand its insistence that there was an unearned premium which rightfully belonged to Mrs. Kuhlman. It is equally incomprehensible why the company should so persistently seek to rescind the contract if, by reason of the forfeiture, it was already lifeless and incapable of rescission. We are entirely satisfied that the question of waiver was submitted to the jury upon proper instructions, and that the finding thereon is supported by sufficient evidence.

The refusal of the court to permit Mr. Gilbert, a witness called on behalf of the defendant, to testify to the filthy condition of the floors of the insured building is assigned ⁴⁰⁴ for error. We think the evidence sought to be elicited could have no very material bearing on the question of damage, and it was not relevant to any other issue. Besides, there having been no formal offer to prove any specific fact, the alleged error is not available.

The court refused to receive testimony on behalf of the company tending to show the cost of putting the building in good condition immediately before the fire. In this there was no error. The plaintiff's claim was not based on an injury suffered by the building in good condition. The question in controversy was the damage caused by the fire—the expense of restoring the building to its former condition. What it would cost to renovate and modernize the whole structure before it was damaged was not an issue in the case, and therefore the evidence tendered was properly refused.

It is finally insisted that there should be a reversal of the judgment because the damages are excessive. The recovery seems quite large, but it is well within the estimates of competent witnesses, and we see no sufficient reason for substituting

our judgment of the evidence for that of the jury. The judgment is affirmed.

INSURANCE. FIRE—UNOCCUPIED PREMISES.—The risk under a fire insurance policy is not necessarily or *prima facie* increased by the insured property becoming vacant or unoccupied: *Moody v. Insurance Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699; and a condition in a policy rendering it void if the premises become vacant and unoccupied may be waived by the insurer: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745. On the signification of the terms "vacant and unoccupied," see the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390-396.

INSURANCE. FIRE.—A WAIVER OF A FORFEITURE by a fire insurance company need not be based upon any new agreement or an estoppel: *Home Fire Ins. Co. etc. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521; and it precludes a party from afterward insisting upon the forfeiture as a defense: Note to *Home Fire Ins. Co. etc. v. Kennedy*, 53 Am. St. Rep. 526; *City Planing etc. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552. A forfeiture may be waived by an agent of the insurer: *German-American Ins. Co. v. Humphrey*, 62 Ark. 349, 54 Am. St. Rep. 297; or its waiver by the company may be presumed from his acts: *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717; *Springfield etc. Co. v. Traders' Ins. Co.*, 151 Mo. 90, 74 Am. St. Rep. 521.

INSURANCE—RETURN OF PREMIUMS.—The liability of an insurance company for the return of premiums is not absolute, but depends upon whether the policy has become a binding contract between the parties. If it has, and the risk has commenced, there can be no apportionment, and no action lies for the recovery of the premiums paid: *Mailhoit v. Metropolitan Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336; but if no risk ever attached under the policy, the premiums paid must be returned: *Jones v. Insurance Co.*, 90 Tenn. 604, 25 Am. St. Rep. 706.

INSURANCE—FORFEITURE—REVIVAL.—A policy of fire insurance which has become void by reason of a violation of a condition against the premises becoming unoccupied is not revived when subsequently occupation of the premises is resumed. The contract having been terminated, it could not be revived without the consent of both the contracting parties: *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556.

LONGFELLOW v. BARNARD.

[58 NEBRASKA, 612.]

BANKS AND BANKING—UNINCORPORATED BANK—DISPOSAL OF ASSETS.—An unincorporated bank is not a de facto corporation, and its president, who is its sole owner, may transfer any of its property to secure a bona fide creditor.

MORTGAGES—FRAUDULENT—ASSIGNMENT TO BONA FIDE CREDITOR.—Where a mortgage given to defraud creditors is assigned by the mortgagee, who is also the vendee of the property, as security to a bona fide creditor of the mortgagor, such transaction is, in substance, a restoration of the property to the owner, and the execution by him of a mortgage thereon to secure the just claim of a creditor. The original mortgage is thereby purged of the fraud with which it was originally tainted, and becomes a valid and enforceable security.

FRAUDULENT CONVEYANCES — PREFERENCES. — A FRAUDULENT VENDEE may, without authority from his vendor, prefer one of the latter's creditors.

MERGER OF ESTATES.—Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property is generally a question of the owner's intention; he may elect to keep them separate.

MORTGAGES — FRAUDULENT—ASSIGNMENT—CONSIDERATION.—The assignment of a fraudulent mortgage by the mortgagee to a just creditor of the mortgagor does not require a consideration moving from the assignee to the assignor to support it.

MORTGAGES — CONSIDERATION.—A PRE-EXISTING DEBT, already due, is a sufficient consideration for the execution of a mortgage securing the same.

MORTGAGES—INDEMNITY—CONSIDERATION.—The liability of a principal debtor to his surety or guarantor is a valuable consideration for the execution to him of an indemnity mortgage.

Munger & Courtright, for the appellant.

Good & Good, for the appellee.

613 SULLIVAN, J. This action was instituted in the district court by the appellee against the appellant to cancel and annul a mortgage upon lot 7 and the west half of lot 8 in the county addition to the city of Wahoo. The defendant answered, asserting the validity of his mortgage and demanding a foreclosure of the same. The decree granted the relief sought by the petition and dismissed the counterclaim. Barnard brings the record here for review by appeal.

Most of the essential facts are either admitted or specifically found by the trial court. The lots were originally owned by W. H. Dickinson and are covered by a large brick building, one room of which was used and occupied for some years prior to

1893 by the State Bank of Wahoo. The bank was not incorporated, but was a private institution owned and managed by Dickinson, who was at the same time conducting a real estate, loan, and insurance business. He was also interested in an electric light plant and owned an elevator and coal yard. On January 24, 1893, Dickinson, being insolvent and having absconded, the bank closed its doors and soon afterward passed into the hands of a receiver appointed under the authority of section 14, chapter 37, page 397, of the Session Laws of 1889. In November, 1892, Dickinson, for the purpose of defrauding his creditors, executed to his sister in law, Harriet E. Adams, the mortgage in suit, and about a month later he made a fraudulent conveyance to her of the legal title to the mortgaged property. The deed contained a recital to the effect that the grantee had assumed the payment of her own mortgage. Both instruments were filed for record at the same time. Prior to the events just recounted Dickinson, in some transaction not connected with the banking business, became indebted to Barnard in the sum of two thousand dollars. This indebtedness was evidenced by a promissory note which Barnard had sold to the First National Bank of Fremont ⁶¹⁴ with a guaranty of payment at maturity. The note became due on January 1, 1893, and, being unpaid, Barnard went to Wahoo with a view of obtaining security or payment. He was unable to see Dickinson, but he obtained from Miss Adams, as protection to his guaranty, an assignment of her mortgage and the note which it was given to secure, and he agreed, in consideration of receiving the collateral, to take up the note which was still held by the Fremont bank and carry it himself for some indeterminate time. The defendant did afterward take up the note according to his agreement, and now seeks to obtain payment by foreclosure of the Adams mortgage. The receiver is in possession of the property. He holds the legal title, which was conveyed to him by Miss Adams in recognition of his superior right and subject only to such encumbrances as the courts of this state might adjudge to be valid. The trial court found that Barnard knew, or ought to have known, that the conveyances by Dickinson to Adams were made for the purpose of defrauding creditors. This finding seems to be warranted by the evidence, and we shall, therefore, in the further consideration of the case, assume its correctness.

With this statement of the salient facts we proceed to examine what we deem to be the decisive points discussed in the

briefs of counsel. The validity of the mortgage in the hands of the defendant is the cardinal question which each of the parties, in demanding affirmative relief, presents for decision. The appellee insists that the State Bank of Wahoo was a de facto corporation, and that the mortgaged property, being a bank asset, was primarily liable for the payment of claims growing out of the bank business. We cannot accept this view, for it is obviously based on a false assumption. The business of the bank was conducted, it is true, by a president and cashier; but articles of incorporation were never adopted. It had no board of directors. It never pretended to possess or exercise corporate powers. It was incapable of contracting debts or of owning and holding property. ⁶¹⁵ In its reports to the state banking board it was represented as a private concern, of which W. H. Dickinson was the sole proprietor. Certainly, it was not in fact a legal entity, and we know of no reason why the owner, or those in privity with him, should be precluded from asserting the truth in regard to the matter. The assets of the bank represented merely the portion of Dickinson's capital invested in banking, and its liabilities represented the indebtedness incurred by Dickinson as a banker. The assets were his, and he might dispose of them as he pleased, subject, of course, to the power of creditors to reclaim them if the disposition should be in fraud of their rights. The liabilities were also his, and for their satisfaction all of his property, not exempt by law, was equally liable to seizure and sale. It results from these considerations that Barnard, before the appointment of the receiver, might have obtained from Dickinson security for the two thousand dollar note in the form of a mortgage on the real estate in controversy; and he might also, with Dickinson's consent, take as security an assignment from Miss Adams of the mortgage in suit. Such a transaction would be, in substance, a restoration of the property to the owner and the execution by him of a mortgage thereon to secure the just claim of a creditor: *Murphy v. Briggs*, 89 N. Y. 446. It would effectually purge the mortgage of the fraud with which it was originally tainted and make it a valid and enforceable security. This proposition is amply sustained by authority: *Oriental Bank v. Haskins*, 3 Met. 332, 38 Am. Dec. 140; *Crowninshield v. Kittridge*, 7 Met. 520; *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469, 17 Am. Dec. 439; *Butler v. White*, 25 Minn. 432; *Brown v. Webb*, 20 Ohio, 389; *Dolan v. Van De-mark*, 35 Kan. 304. In the cases here cited the property con-

veyed to defraud creditors was afterward, with consent, or by the direction, of the debtor, applied to the payment of his debts. They were cases in which he exercised, through the agency of the fraudulent transferee, his undoubted right to pay or secure some of his creditors to the prejudice ⁶¹⁶ of others. The case at bar is somewhat different, and we were at first inclined to think that Miss Adams had no implied power to make either the defendant or the Fremont bank a preferred creditor; but the judicial utterances, we find, are to the effect that she had. In *Dolan v. Van Demark*, 35 Kan. 304, Valentine, J., delivering the opinion of the court, said: "While, generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a bona fide purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a bona fide debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale." In *Webb v. Brown*, 3 Ohio St. 246, which was a contest between creditors, it was distinctly held that the fraudulent vendee might, without authority from his vendor, prefer one of the latter's creditors. The court said: "A conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property." We accept this as a correct statement of the law, and accordingly hold that the assignment from Miss Adams was just as effectual as though it had been made with Dickinson's express consent.

But it is contended by the receiver that Miss Adams had no mortgage to assign; that it was merged in the legal estate and ceased to exist when she became the owner of the fee. Upon this point the trial court made no finding, but the evidence, we think, pretty conclusively ⁶¹⁷ shows that the mortgage was not extinguished. Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property is generally a question of

the owner's intention: *Matthews v. Jones*, 47 Neb. 616; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9. Miss Adams agreed, in the deed from Dickinson, to pay this mortgage. She filed both instruments for record at the same time and afterward assigned the mortgage as security. These facts clearly evince an election by her to keep it alive: *Aetna Life Ins. Co. v. Corn*, 89 Ill. 170; *Kellogg v. Ames*, 41 N. Y. 259.

The receiver asserts that the assignment of the mortgage was void for want of a valuable consideration to support it. We do not think it was. The transaction, as we have already pointed out, was, in substance and legal effect, the execution by Dickinson to Barnard of a mortgage to secure the payment of the two thousand dollar note: *Murphy v. Moore*, 23 Hun, 95; *Seymour v. Wilson*, 19 N. Y. 417. While it was primarily intended to indemnify Barnard against loss by reason of his guaranty, it was, as a matter of law, a security to which the First National Bank of Fremont might rightfully resort for the payment of its claim, even though it did not rely on it or know of its existence: *Blair State Bank v. Stewart*, 57 Neb. 58; *Seibert v. True*, 8 Kan. 52; *New Bedford Inst. etc. v. Fairhaven Bank*, 9 Allen, 175; *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478. The existence of the debt and the guaranty of its payment made the assignment valid without any other consideration. The assignor was entitled to no consideration. She parted with nothing that was lawfully hers. She merely transferred Dickinson's property to pay Dickinson's debt. That a pre-existing debt, already due, is a sufficient consideration for the execution of a mortgage securing the same is a doctrine well established by the decisions of this court: *Turner v. Killian*, 12 Neb. 580; *Henry v. Vliet*, 36 Neb. 138; *Chaffee v. Atlas Lumber Co.*, 618 43 Neb. 224, 47 Am. St. Rep. 753. And it is equally well settled that the liability of a principal debtor to his surety or guarantor is a valuable consideration for the execution to him of an indemnity mortgage: *Blair State Bank v. Stewart*, 57 Neb. 58; *Stevens v. Bell*, 6 Mass. 342; *Buffum v. Green*, 5 N. H. 71, 20 Am. Dec. 562; *Williams v. Silliman*, 74 Tex. 626; 6 Am. & Eng. Ency. of Law, 2d ed., 709. Had Dickinson himself made the mortgage to defendant, he certainly could not successfully resist foreclosure on the ground that there was no legal consideration. Neither can the plaintiff acting as a representative of creditors. The appointment of the receiver was in the nature of an equitable execution. By it the court was able to reach only the actual interest of the debtor

in the property—the interest which the creditors themselves might have reached with an execution issued on a judgment at law in their favor. The judgment is reversed and the cause remanded, with direction to the district court to render a decree foreclosing the defendant's mortgage as prayed.

A CORPORATION DE FACTO is a corporation organized and operated under color of the law, but not legally constituted: *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743. See, further, *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220; and the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 181-184.

FRAUDULENT CONVEYANCES—PURGING FRAUD.—A conveyance fraudulent as against creditors or subsequent purchasers is voidable only, not void, and may be purged of the fraud by matter *ex post facto*, whereby the fraudulent intent is abandoned, and the conveyance confirmed for a good and adequate consideration *bona fide*: *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140. Compare *Caldwell v. Walker*, 76 Miss. 879, 71 Am. St. Rep. 545.

ON **FRAUDULENT CONVEYANCES** in general, see the extended notes to *State v. Mason*, 34 Am. St. Rep. 395-403; *Bank of Little Rock v. Frank*, 58 Am. St. Rep. 74-101; *Hagerman v. Buchanan*, 14 Am. St. Rep. 743-754.

MORTGAGES—CONSIDERATION.—A pre-existing indebtedness is a sufficient consideration to support a mortgage: *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753. So an actual liability incurred by becoming a surety on a redelivery bond is a sufficient consideration for a mortgage given as indemnity to such surety: *Landigan v. Mayer*, 82 Or. 245, 67 Am. St. Rep. 521.

ENTERPRISE DITCH COMPANY v. MOFFITT.

[58 NEBRASKA, 642.]

CORPORATIONS—ASSESSMENTS ON PAID-UP STOCK.—In the absence of statutory authority, or of express power conferred by the articles of incorporation, there can be no assessment of the fully paid-up stock of a corporation.

CORPORATIONS—STATUTE AUTHORIZING ASSESSMENT OF PAID-UP STOCK.—Where neither the statutes of a state nor the articles of incorporation permit the assessment of the fully paid-up shares of stock of a corporation, a statute cannot be passed authorizing the assessment of such paid-up stock, since it would be violative of the accrued, contractual, and property rights of their owners.

J. H. Broady and F. H. Bentley, for the appellants.

F. A. Wright and C. C. Wright, for the appellees.

643 **HARRISON, C. J.** Six actions were commenced in the district court of Scott's Bluff county, in each of which it was

sought to enjoin the sale by the Enterprise Ditch Company, a corporation, of some shares of fully "paid-up" corporate stock owned by the plaintiff in the suit because of the nonpayment by the holder of certain assessments against said stock. The six suits were by stipulation consolidated and tried as one. Injunctions were allowed, and from the decrees appeals have been perfected for the ditch company, and the one decision here is to be applicable in all the cases. It was alleged in the petition, and admitted, "that the Enterprise Ditch Company was duly organized as a corporation under the laws of the state of Nebraska on or about the seventh day of March, 1889, and ever since has been a corporation under the laws of the state of Nebraska and doing business in Scott's Bluff county, Nebraska." A copy of the articles of incorporation was attached to each petition. Article 3 reads: "The general nature of the business to be transacted is to acquire, construct, operate, and maintain a canal taking water from the North Platte river, in said county and state, and diverting and appropriating water from said river sufficient to fill their said ditch at all times as may be necessary for the use of persons taking water therefrom and conducting through their said canal, and renting, leasing, selling, and otherwise disposing of water, water rights, or stock in said ditch to persons owning ⁶⁴⁴ lands under said ditch, or to any other person or persons, in the discretion of the board of directors or trustees, for the purpose of irrigation, milling, manufacturing, domestic, or other as may be necessary to fully carry out the business for which the same is organized." The provision in relation to by-laws is as follows: "The duties of all officers shall be prescribed by the by-laws of said corporation. And the board of trustees shall have authority to adopt such prudential by-laws as they shall deem proper and expedient for the management of the affairs of said corporation, and not inconsistent with the laws of the state of Nebraska, for the purpose of carrying on the business within the objects and purposes of this corporation."

By statute it is provided: "Every corporation, as such, has power . . . to make by-laws, not inconsistent with any existing law for the management of its affairs": Comp. Stats. 1897, c. 16, sec. 124. In the by-laws adopted by the ditch company it is provided that "the board of directors shall exercise a general supervision over the affairs of the company. . . . The board shall hold regular quarterly meetings, the first Tuesday in December, March, June, and September. The board of di-

rectors shall at their first quarterly meeting make an estimate of the total cost of maintenance and levy an assessment for such an amount, subject to the call of the board of directors from time to time, as the same shall be needed." It is further provided: "For nonpayment of dues on any cash assessment.—When any stockholder shall be in default of payment of any installment of assessment upon his stock, pursuant to any levy or assessment of the board of directors or trustees, for the period of thirty days after personal notice thereof or request to pay the same by the secretary, or after written or printed notice and demand therefor has been deposited in the post-office, properly addressed to such delinquent stockholder, the board of directors ⁶⁴⁵ may, at any meeting, order that the shares of stock held by such delinquent stockholder, and all the right or interest of such stockholder therein be sold by the president of the company at public auction, or at some certain time and place to be designated in such order, to the highest bidder for cash; provided, however, that notice of the time and place of such sale shall be published in some general newspaper in Scott's Bluff county, Nebraska, for four consecutive weeks just prior to such sale, proof of which publication shall be the affidavit of the publisher or foreman of such paper. Further, that the proceeds of such sale, over and above the amount due on such shares, and all expenses incidental to such sale, shall be paid to such delinquent stockholder, and the treasurer of this company may, for the company, purchase the said shares at said sale for an amount not exceeding what shall be due from such stockholder to the company, or, instead of the sale mentioned, the board of directors may, after like notice to the delinquent stockholder, make an order that at a certain time and place the stock of such delinquent shall be canceled at such time and place mentioned in the said order. If said delinquent fail to pay the same, then it shall be lawful for the said board of directors to declare the same canceled, and from that date the said stock shall be subject to subscription and sale the same as though it had never been sold, and all money paid thereon shall be forfeited and absolutely belong to the company." The action taken at the meeting on January 27, 1894, according to the record introduced, was as follows: "Motion by Wright that a cash levy of six dollars and fifty cents per share be made upon the stock of the company, including the additional stock due and to be issued for work done in enlarging the canal; that four dollars per share of said assessment

be declared due in thirty days after notice to stockholders, the balance of said assessment to be subject to the call of the directors of the company." November 16, 1894: "Moved and seconded that a special levy of one dollar and fifty cents per share on the capital stock of the company be made to ⁶⁴⁶ complete this enlargement. Carried." And on April 13, 1895: "On motion, it was decided to make a cash assessment of four dollars and fifty cents per share for maintenance for the present year, two dollars of the same to be paid before the delivery of water; balance to be paid when the board demanded same. Before water is delivered, approved security to be given for the payment of the same; also all back dues to be paid before water is delivered." At a meeting on October 19, 1895, it appears: "It was moved and seconded that we advertise the delinquent stock, or any stock not paid up on assessments, there being in default the following stock certificates, Nos. 125, 142, 178, 191, 116, 130, 143, 144, 135, 176, 142, 49, 88, were ordered advertised and sold." Notice was published and sale of the shares of stock would have ensued had it not been enjoined.

There was no statutory authority to assess stock of which the amount had been fully paid, neither did the articles of incorporation confer any express power so to do. In the absence of authorization by either, the directors could not enact a by-law by which provision was made for such assessments, and especially not to be enforced by a sale or practical forfeiture of stock: *Omaha Library Assn. v. Connell*, 55 Neb. 396; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; 2 *Beach on Private Corporations*, sec. 590; *Cook on Stock and Stockholders*, secs. 241, 242; *Thompson on Corporations*, secs. 1037, 1038; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *In re Long Island R. R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *State v. Morristown Fire Assn.*, 23 N. J. L. 195; *Williams v. Lowe*, 4 Neb. 382.

A short time prior to the last assessment to which we have referred a legislative enactment of 1895 had become of effect, sections 66 and 67 of which were as follows:

"Sec. 66. Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs, or other works for irrigation purposes, and deriving no revenue from the operation of such canal, reservoir, or works, shall be termed a mutual irrigation company, and any by-laws adopted by ⁶⁴⁷ such company prior to or after the passage of this act, not in conflict herewith, shall be deemed

lawful and so recognized by the courts of this state; provided, such by-laws do not impair the rights of one shareholder over another.

"Sec. 67. Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs, or other works for irrigation purposes may through its board of directors or trustees assess the shares, stock, or interest of the stockholders thereof for the purposes of obtaining funds to defray the necessary running expenses of such corporation or association. Any assessments levied under the provisions of this section shall become and be a lien upon the stock or interest so assessed; such assessment shall become delinquent at the expiration of sixty days if not paid, and the said stock or interest may be sold at public sale to satisfy said lien. Notice of such sale shall be given in some newspaper published and of general circulation in the county where the office of the company is located, the said notice to be published for four consecutive weeks prior to date of sale, upon the date mentioned in the advertisement, or at such time to which the sale has been adjourned, the said stock, or interest or so [much] thereof as may be necessary to satisfy said lien and costs of advertisements and sale, shall be sold to the highest bidder for cash": Comp. Stats., c. 93a, art. 2, secs. 66, 67.

The paid share or shares of stock were the personal property of any individual owner, and a contract, which embodied the articles of incorporation and the pertinent laws of the state, existed, to which the shareholder was a party. Without a discussion or notice of some other branches of the argument and subject, it must be said that the legislature could not so change these accrued, contractual, and property rights as to allow an assessment against the "paid-up" stock, and its forfeiture or sale for the nonpayment. This would involve too violent an invasion of property and contract rights: 1 Cook on Stock ⁶⁴⁸ and Stockholders, sec. 50; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; Detroit v. Detroit etc. Plank Road Co., 43 Mich. 140; Beach on Private Corporations, secs. 40, 41.

It follows that the decree will be affirmed.

The Right of Corporations to Assess Their Stockholders.*

Definition.—By "assessment" in this note, we shall mean a call for further contribution from the stockholders after their stock sub-

*REFERENCES TO MONOGRAPHIC NOTES.

Power of courts to compel the levy of assessments for the payment of subscriptions: 100 Am. Dec. 552-557.

Subscriptions to corporate stock, assessments to pay installments on: 81 Am. Dec. 393-395.

scriptions have been paid in full. In this sense an "assessment" and a "call" are not synonymous terms, although they are frequently used interchangeably. A call, strictly speaking, means an official declaration, by the proper authorities of a corporation, that a part or the whole of a stockholder's subscription for stock must be paid within a certain time. A "call," therefore, is properly applied only to unpaid subscriptions, while an "assessment" is used with reference both to unpaid and to fully paid subscriptions: *Omo v. Bernart*, 108 Mich. 43; 1 Cook on Corporations, sec. 104. We shall use it in the latter sense only.

Assessments on Unpaid Stock are "calls," and as to them there is no question of the right of a corporation to call for the unpaid subscriptions to stock. These calls or assessments can only be made at proper times, usually in specified amounts, and certain formalities are required in order to validate them when made by the proper authority of the corporation. Questions which concern assessments of this character we shall not discuss. The problem suggested by the principal case relates solely to assessments on paid-up stock.

Who may Make Assessments.—Ordinarily, the only competent authority to make an assessment of any kind is the board of directors: *Germantown etc. Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 3 Am. St. Rep. 169. Where a statute is silent as to who has such power, it devolves upon the directors: *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 3 Am. St. Rep. 169. Where no authority is given by statute or by the charter of the corporation to assess fully paid shares, such assessment cannot be levied by a majority of the stockholders themselves or by a majority of the board of directors: *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Trustees of Schools v. Flint*, 13 Met. 539. Even where the corporation has become insolvent and suspends business and later reorganizes, a majority of the stockholders cannot, in its reorganization, agree to assess that stock which is already fully paid. The corporate existence of the old organization still continues, notwithstanding its insolvency, and the legal rights of the shareholders cannot be taken away from them by a majority, however large: *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52. Where assessments on paid-up stock are authorized, a receiver of the corporation may, under some circumstances, levy an assessment. Hence, a receiver of a mutual life insurance company, which company has power to levy assessments upon capital stock notes of the corporation, may exercise the authority of the corporate directors and levy such an assessment: *Regener v. Phillips*, 26 Misc. Rep. 311; 56 N. Y. Supp. 174. But where the only authority of the directors of a corporation to levy assessments on paid-up stock is limited to repairing the capital stock when it has been impaired by losses or otherwise, a receiver has no power to levy assessments, because the receiver would assess for the purpose of paying debts and for the benefit of existing creditors, while the statute looked

to a continuance of the business by the company, and was intended solely to prevent a continuance on an impaired capital: *Dewey v. St. Alban's Trust Co.*, 57 Vt. 332. At least so far as unpaid subscriptions are concerned, a court of equity, it would seem, has power to make a call or assessment for them, if the directors of a corporation neglect or refuse to make such call, when it is necessary in order to pay the claims of creditors: *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894.

The power to assess paid-up stock is quite frequently conferred on the stockholders instead of the directors, and in such case the stockholders are the only body who can levy a valid assessment. For example, in Rhode Island, assessments on paid-up stock can be made only by the consent of the stockholders owning at least three-fourths of the shares of capital stock, and at a special meeting called for that purpose: *Atlantic etc. Co. v. Mason*, 5 R. I. 463. In Maine a majority of the members of a pew owners' corporation may, at a meeting called by the corporation for that purpose, assess the stockholders to raise money to repair the church: *Mayberry v. Mead*, 80 Me. 27. It seems to be common to authorize corporate directors to make calls for installments upon the capital stock subscribed, and to permit assessments upon the paid-up stock to be made only by a vote of the stockholders at a meeting called for that purpose: See, further, *Price's Appeal*, 106 Pa. St. 421.

Assessments on Paid-up Stock, Generally.—The declaration of the principal case, that in the absence of statutory authority or power given by the articles of incorporation, there can be no assessment against or on the "paid-up" stock of a corporation, is without question the correct and universally recognized rule. The reason for it is not hard to seek. The great and distinguishing characteristic of a corporation is that its stockholders are liable for its indebtedness only to the extent of the full par value of the stock for which they have subscribed. When the full par value of this stock has been paid in, a stockholder is not liable for, and cannot be made to pay, any sums in addition thereto. An assessment on paid-up stock is nothing more than an attempt to impose additional liability upon its owner, which cannot be done in the absence of statutory or charter authority. Personal responsibility of a stockholder is said to be inconsistent with the nature of a body corporate: *Myers v. Irwin*, 2 Serg. & R. 368; *Salt Lake etc. Bank v. Hendrickson*, 40 N. J. L. 52. Such individual liability for corporate debts, as incident to membership in a corporation, was unknown at common law. Immunity from such liability was one of the chief inducements which led to the formation of corporations. The capital was the source of corporate credit, and the full paid-up shares of stock were the only parts of the capital which the stockholder could be called upon to furnish. Beyond this a stockholder was not liable: *Smith v. Huckabee*, 53 Ala. 191; *Jones v. Jarman*, 34 Ark. 323; *Spense v. Iowa etc. Co.*, 36 Iowa, 407; *Walker v. Lewis*, 49 Tex. 123. As

was said in *Toner v. Fulkerson*, 125 Ind. 224: "The distinguishing feature of corporate existence is, that the very fact of incorporation exempts the stockholders from all individual liability after they have paid the amount of their subscriptions for stock. After the full par value of the stock subscribed for has been paid, the common-law liability of the stockholder, both as respects the stockholders and its creditors, is at an end." The personal liability of a stockholder for the debts of the corporation generally arises only from statute: *United States v. Stanford*, 161 U. S. 412; *People v. Coleman*, 133 N. Y. 279; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Gray v. Coffin*, 9 Cush. 192; *French v. Teschemaker*, 24 Cal. 518; *Buenz v. Cook*, 15 Colo. 38. It is from this want of personal liability on the part of stockholders for any amount in excess of the par value of their stock that is reasoned the lack of power in a corporation to assess its stockholders for the purpose of raising money after their stock has become fully paid. No other deduction is possible without overthrowing this basic principle of corporation law. So that by starting with the doctrine that stockholders are liable only to the extent of the par value of their stock, the conclusion must be reached that assessments cannot be levied after such stock has become fully paid, since an assessment is but an attempt to impose additional liability upon the stockholders. The courts are, therefore, unanimous in holding that a corporation has no power, as incident to its organization, to levy an assessment upon stock which has once been fully paid up: *Duluth Club v. Macdonald*, 74 Minn. 254, 73 Am. St. Rep. 344; *Atlantic etc. Co. v. Mason*, 5 R. I. 463; *Omaha Law Library Assn. v. Connell*, 55 Neb. 396; *Wells v. Green Bay etc. Co.*, 90 Wis. 442. The stock must, however, be really paid up: *San Antonio St. Ry. Co. v. Adams*, 87 Tex. 125; otherwise assessments, or, more properly, calls, may be made. Hence where a water company was supplying water to a city under an ordinance which provided that the company should pay up ten per cent of its stock, and no more, unless in pursuance of other provisions of the ordinance or an order of court, it was held that the ordinance as a whole contemplated more than a ten per cent payment, and that assessments could be made calling for additional amounts of the unpaid stock in order that the company might be in a position to complete its contract with the city: *Burlington v. Burlington Water Co.*, 86 Iowa, 266. The fact that illegal assessments have already been paid does not estop the stockholder from objecting to future and larger assessments: *Atlantic etc. Co. v. Mason*, 5 R. I. 463; and a stockholder may, by injunction, restrain a corporation from attempting to forfeit his shares of stock for nonpayment of an assessment where such stock has been fully paid for: *Moore v. New Jersey Lighterage Co.*, 25 Jones & S. 1. This case concerned a foreign corporation, but the rule would be the same as to a domestic corporation: *San Antonio St. Ry. Co. v. Adams* (Tex.), 25 S. W. Rep. 639. This case was reversed on ap-

peal in *San Antonio Street Ry. Co. v. Adams*, 87 Tex. 125, but on the ground that the stock was not paid up, and was, therefore, assessable.

When Assessments may be Made.—The rule that paid-up stock cannot be assessed is, of course, the rule at common law in the absence of any agreement to the contrary. This rule may be changed, however, either by consent or by statute: *Wells v. Green Bay etc. Co.*, 90 Wis. 442. But if the power is not conferred by consent, by some statute, or by the articles of incorporation, the assessment is invalid: *Gary v. York Min. Co.*, 9 Utah, 464; *Duluth Club v. MacDonald*, 74 Minn. 254, 73 Am. St. Rep. 344; *Atlantic etc. Co. v. Mason*, 5 R. I. 463. Stockholders may, as a part of their contract upon entering the corporation, assent to assessments upon their fully paid-up stock. Such assent is binding, and an assessment levied in accordance therewith is valid. This contract may be indorsed on the certificates of stock: *Weeks v. Silver etc. Co.*, 23 Jones & S. 1. But in *Sullivan County Club v. Butler*, 26 Misc. Rep. 306, 56 N. Y. Supp. 1, where the certificate of stock contained on its face the words, "Shares, \$100 each. Full paid, and nonassessable beyond \$10 per annum," it was held that there was no assent to pay assessments on stock to the extent of ten per cent, in any manner not authorized by law, without the stockholder's consent. The stockholder, it seems, had already made and performed his part of the contract, and he was to receive full-paid stock for such performance. From this case it also appears that consent to the assessment of stock cannot be secured by including in a receipt for stock sold a stipulation to that effect. Where a corporate charter authorizes the stockholders to levy assessments on paid-up stock in equal proportions by the consent of the stockholders owning three-fourths of the shares of stock, the stock must have been subscribed for and actually paid in: *Atlantic etc. Co. v. Mason*, 5 R. I. 463. And where a corporation of few owners may, by a majority vote, control the meeting-house, an assessment on such few owners for repairs, in order to be valid, must have been made by a majority vote at a regularly called meeting: *Mayberry v. Mead*, 80 Me. 27. In *Trustees of Louisiana Paper Co. v. Waples*, 3 Woods, 34, the charter of the corporation specified the manner of paying forty per cent of the stock, and then provided that no additional payments should be made except with the assent of three-fourths of the stockholders, and then only to increase the business. The charter, in effect, treated the forty per cent as full payment of the shares, and the court held that no additional assessments could be made except by the stockholders themselves, either for the benefit of the corporation or for the purpose of paying creditors. The charter constituted notice to all creditors that, so far as calling on stockholders for additional payments on their stock was concerned, a forty per cent payment rendered the stock fully paid. Hence it was not subject to assessment in any manner not sanctioned by the charter of the corporation. Where no agreement has been entered into, stockholders may voluntarily assess themselves for the betterment of the corpora-

tion, and such assessments are not debts against, but are assets of, the corporation: *Broderick v. Brown*, 69 Fed. Rep. 497; *Bidwell v. Pittsburgh etc. Ry. Co.*, 114 Pa. St. 535. And these voluntary assessments cannot be recovered back from the corporation: *Bidwell v. Pittsburgh etc. Ry. Co.*, 114 Pa. St. 535; *Leavitt v. Oxford etc. Min. Co.*, 3 Utah, 265. As we have already noticed, however, such a voluntary assessment must be levied by a unanimous vote, and neither a majority of the directors nor a majority of the stockholders can make such an assessment.

Various methods have been resorted to in the attempt to assess stock which has once been fully paid. The attempt has frequently been made to make such stock assessable by means of a by-law adopted by the shareholders or by the directors. Such attempt is always futile, as applied to those who are already stockholders in the corporation. It impairs vested rights, and is in the nature of *ex post facto* legislation. As was said in *Sullivan County Club v. Butler*, 26 Misc. Rep. 306, 56 N. Y. Supp. 1: "To hold that a by-law imposing an annual assessment on stock already fully paid for is a lawful exercise of corporate power is tantamount to holding that a corporation may, by a single resolve in the form of a by-law, put its stockholders in debt to it annually to any amount that it may see fit to specify, and all without their consent. To state such a proposition is simply to refute its legality." As intimated by this same case, if the by-law had been in existence when the stockholder purchased his stock, and he had knowledge of its existence, then such by-law might be considered a part of the contract of purchase, because made with reference to it. The by-law which seeks to authorize assessments must, however, lay the assessment on the stockholder as such holder in proportion to the amount of stock held, and not upon him as a member of the corporation. In other words, the by-law must authorize assessment upon the stock and not upon the man. For there may, under certain circumstances, be a levying of dues on every individual member of a corporation when an assessment in proportion to the stock held will be invalid. Hence where articles of incorporation provided for the forfeiture of stock in a library association for failure to pay annual dues assessed on the owner, it was held that annual dues of fifteen dollars provided by the by-laws were not assessments on paid-up stock which a by-law could not impose, but were mere dues on the individual members, and were authorized under the corporate charter. The by-law was, therefore, valid and enforceable: *Omaha Law Library Assn. v. Connell*, 55 Neb. 396. But a by-law which unreasonably increases the amount of dues is not binding on one who does not assent thereto: *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. St. 264. And a corporation has no power to impose fines by a by-law where no limit is prescribed in regard to the extent or amount of such fines: *Albers v. Merchants' Exchange*, 39 Mo. App. 583.

Assessments Authorized by Statute.—While assessments on paid-up stock are sometimes authorized by contract or made by voluntary

contributions, the most frequent means of acquiring such power is by virtue of some statute, which changes the common-law rule. These statutes are of two general kinds: 1. Those which either in terms or by a reasonable construction confer power on a corporation to assess its paid-up stock; and 2. Those which make stockholders liable for a certain portion of the debts of the corporation, and thus only by inference confer any power of assessment. In addition to these classes, there are those provisions which are so frequently included in the charters of corporations, reserving to the legislature power to alter, repeal, or amend such charters. When such a provision occurs in a corporate charter, a stockholder can raise no objection because the legislature has subsequently amended the charter and authorized the assessment of his paid-up stock. The freedom from assessment which existed under the first charter is not a vested right where the legislature has reserved the power to change it. This was so held in *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238, where the original charter of the insurance company exempted the stockholders from any liability further than the amount of their respective shares and interest thereon, and the legislature, by an amendment, imposed liability for certain assessments which might subsequently be made by the corporation: See, also, *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

The usual method of providing for assessments on stock which has been fully paid for is by a statute directed to such an end. This is the case in California, where assessments on paid-up stock are authorized by sections 331 to 333 of the Civil Code. These provisions do not use the words "paid-up stock" in reference to assessments, but that the sections were intended to be applied to such stock is clear, and the supreme court has uniformly sustained this view: *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193; *Younglove v. Steinman*, 80 Cal. 375; *Green v. Abietine Medical Co.*, 96 Cal. 322. In Utah, assessments on paid-up stock are allowed, and the stock may be sold to pay them: *Gary v. York Min. Co.*, 9 Utah, 464. This case shows, however, that there may be some question as to when the articles of incorporation provide for such assessments. Here the articles of agreement set apart a certain amount of capital stock for working capital, and provided that no assessment should be levied until this working capital was exhausted. The stockholders in question objected to the assessment which had been levied on the ground that the working capital stock had not all been sold. But it was shown that reasonable efforts had been made to sell it, though without success. And the court held that the directors had a right to levy the assessment, for, having made reasonable yet futile efforts to sell the reserve stock, such stock as a means of paying debts was exhausted within the meaning of the articles of incorporation. In New Hampshire assessments may be levied for the purpose of paying debts, but for none other. Hence an assessment for the general purpose of building a mill and carrying on business, as well as for

paying debts is illegal in its principal part, and being indeterminate is unauthorized: *Lancaster Starch Co. v. Moore*, 62 N. H. 671. That assessments on paid-up stock are authorized elsewhere by statute, see *Price's Appeal*, 106 Pa. St. 421; *Guadalupe etc. Assn. v. West*, 70 Tex. 391; *State v. Morristown Fire Assn.*, 23 N. J. L. 195. Where the authority to levy assessments is limited in amount, no assessments can be made beyond such sum. Hence where the corporate charter provided that no assessment should be laid upon any share greater than one hundred dollars in the whole on such share, an assessment which exceeded this sum was illegal: *Great Falls etc. R. R. v. Copp*, 38 N. H. 124. And where a statute restricted the total amount that could be raised by assessment to four thousand dollars, when that amount had been reached, the power to assess was exhausted: *State v. Morristown Fire Assn.*, 23 N. J. L. 195. It would seem that where the authority is given by statute to a corporation to assess its paid-up stock, the power may be restricted by a by-law, and the amount and character of sums which can thus be raised can be limited in this manner by the corporation itself: *Price's Appeal*, 106 Pa. St. 421.

It is very doubtful whether, under a statute which makes stockholders liable for the corporate debts in proportion to the amount of stock owned by them, an assessment can be made for the purpose of paying such debts. It is clear that such a statute imposes personal liability upon stockholders whether their stock is fully paid or not; the doubt is merely as to whether this liability can be enforced, and the money to pay for such debts be collected, by means of an assessment. This is only a question of remedy, however, and hence, if a subsequent statute empowers the directors of a corporation to levy assessments for the purpose of paying debts, such an act is valid, since it does not increase the liability under which the stockholders rested by virtue of the original statute, and an assessment levied in accordance with the new statute may be enforced: *Sparks v. Lower Payette Ditch Co.*, 2 Idaho, 1030. In this case the liability under the original statute was for debts alone, and the assessment levied under the subsequent act was to provide for the payment of debts only. The act, however, authorized assessments for the purpose of conducting business, which would naturally include not only the payment of debts, but the erection of improvements. So far as improvements already completed were concerned, they were debts for which the stockholders were already liable under the statute imposing personal liability. But as to contemplated improvements, the stockholders were not liable for them before completion, and it would seem that any assessment for such purpose would be imposing a new and added liability upon the stockholders, which could not be done without their consent, and assessments must, therefore, of necessity be confined exclusively to the payment of debts.

Assessments on paid-up stock when allowed by statute must be made in substantial compliance with the requirements of the statute. All steps must be formally complied with: *Raht v. Sevier Min. etc. Co.*, 18 Utah, 290; though mere irregularity does not render the assessment void, but only voidable. And the assessment must be equal and just on all stockholders: *Green v. Abietine Medical Co.*, 96 Cal. 322.

Assessment of Stock Issued as Paid Up.—Frequently a corporation will issue stock as fully paid up when in reality either no payment has been made or only a small part of the par value has been paid. The question then arises as to what effect this will have upon assessments which are sought to be levied. Clearly, if such stock is to be treated as fully paid, no assessment can ordinarily be made, since we have already seen that paid-up stock is not assessable in the absence of power conferred either by consent or by statute. We are not concerned here with the important questions which have arisen out of the issuance of watered stock, and especially as to what extent the capital stock of a corporation is a trust fund for the benefit of creditors, which cannot be issued as paid up so as to defeat the rights of creditors. We are interested only in the proposition as to whether, when a corporation has issued its stock as paid up, it can, in disregard of such agreement, levy assessments as if the stock were not fully paid. And in this connection we use the word "assessment" to mean a "call" which the corporation may make on the holders of unpaid stock to pay certain installments. There would seem to be no reason why a corporation could not agree with its stockholders to issue stock to them as paid in full. Such an agreement would seem to be binding as between the corporation and the holders of such stock, and the corporation cannot repudiate such agreement and proceed to collect the unpaid balance of the par value of the stock. The agreement may not in all cases be valid as to creditors, or as against the state, or it may even amount to such a fraud as the corporation itself can avoid the entire agreement of the sale of stock. But as concerns the power of the corporation to levy assessments on such stock, or, in other words, to make calls for the unpaid balance, the corporation is by its agreement estopped from so doing. Most of the statements found in the cases on this point seem to be dicta, yet the principle of nonliability to assessment, so far as the corporation is concerned, seems to be well recognized. In *First Nat. Bank v. Gustin etc. Min. Co.*, 42 Minn. 327, 18 Am. St. Rep. 510, the contention was urged that the holders of stock issued as paid up, when not so in fact, were individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they had actually paid therefor. But in denying the right of the corporation, as such, to make such calls, the court said: "It is very clear from the facts that the defendant company has no claim against the defend-

ant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid." And in *Scovill v. Thayer*, 105 U. S. 143, the court used this language: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter. . . . No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors. . . . If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount' according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company." To the same effect, see *Union etc. Ins. Co. v. Frear etc. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Northern Trust Co. v. Columbia etc. Co.*, 75 Fed. Rep. 936; *Wells v. Green Bay etc. Canal Co.*, 90 Wis. 442; *Granite etc. Co. v. Michael*, 54 Md. 65. If the stockholder, at the time of acquiring his shares, was under a liability to pay their par value, such liability cannot be released by a mere resolution of the board of directors to that effect, there being no consideration for such release: *Zirkel v. Joliet Opera-House Co.*, 79 Ill. 334. In *York Park Bldg. Assn. v. Barnes*, 39 Neb. 834, where the promoters of a corporation entered into an agreement with a subscriber to stock that such subscriber should not be required to pay for it, the influence of his name being all that was desired, it was held that the agreement was void, being a fraud on other stockholders subscribing on the faith of his subscription, the corporation was not bound by the agreement, and could enforce the payment of the subscription. And in *Wishard v. Hansen*, 99 Iowa, 301, 61 Am. St. Rep. 238, where the stock, while being issued as fully paid, showed on its face that it was subject to assessment for the payment of the principal and interest of a mortgage on the lands and personal property of the company, it was held that the facts justified a finding that the stockholder was liable for an assessment which had been levied.

A bona fide purchaser of stock, which has been issued as fully paid, is not liable for the unpaid portion, either by way of assessment by the corporation or to satisfy the claims of creditors, or otherwise, when he has no notice that it is not paid up: *Young v. Erie Iron Co.*, 65 Mich. 111; *Rood v. Whorton*, 67 Fed. Rep. 434;

74 Fed. Rep. 118; *Brant v. Ehlen*, 59 Md. 1; *Albitztigui v. Guadalupe* etc. Min. Co., 92 Tenn. 598. The doctrine that the stock of a corporation is a trust fund for the benefit of creditors does not permit it to be followed into the hands of bona fide purchasers, any more than any other trust fund: *Steacy v. Little Rock etc. R. R. Co.*, 5 Dill. 348; *Sanger v. Upton*, 91 U. S. 56.

RUSTIN v. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

[58 NEBRASKA, 792.]

ACCIDENT INSURANCE—OVEREXERTION.—An accident insurance policy, exempting the insurance company from liability for injuries caused by voluntary overexertion, does not deprive the insured of his right to indemnity because his injury resulted from overexertion, unless the overexertion was conscious and intentional.

ACCIDENT INSURANCE—OVEREXERTION.—The lifting of a three hundred pound dumb-bell is not, as a matter of law, an act of such conscious and intentional overexertion as to deprive an insured of his right to indemnity by reason of such act.

ACCIDENT INSURANCE—OVEREXERTION—NEGLIGENCE OF INSURED.—Where an accident insurance policy exempts the company from liability for injuries caused by voluntary overexertion, mere contributory negligence on the part of the insured in regard to such overexertion is no defense to an action on the policy.

James H. McIntosh and Charles A. Goss, for the appellant.

L. F. Crofoot, for the appellee.

793 **SULLIVAN, J.** This action was brought by Charles B. Rustin to recover on a policy of accident insurance issued to him by **794** the Standard Life and Accident Insurance Company. The injury upon which the claim for indemnity is grounded was the result of an effort on the part of plaintiff to raise a heavy dumb-bell from the ground. The contract contained a stipulation exempting the company from liability for injuries occasioned by unnecessary lifting and voluntary overexertion. The action was defended on the theory that the accident was within the exemption clause. The trial court, at the conclusion of plaintiff's testimony, instructed the jury to return a verdict in favor of the defendant. The correctness of this instruction is the single question presented by the record for decision. The facts being undisputed, we are only required

to determine whether they are, under the most favorable construction, sufficient to sustain a verdict in favor of the insured. Rustin was described in his application for insurance as a capitalist. After the issuance of the policy he became president of the Courtland Beach Association, a company owning and conducting a pleasure resort near the city of Omaha. This company was arranging to give an exhibition representing the destruction of Pompeii, and the plaintiff was on the ground superintending the preparatory work. While thus engaged he sustained the injury in question. His own account of the accident is as follows: "Construction was going on for giving the show called 'Pompeii,' and I was out there superintending the building of the seats and so on; and at noon I took my lunch, and after dinner I went out in the shade of a tree, and was lying down, smoking. There had been an arrangement made for the commencement of a performance by Miller—I have forgotten what Miller—a strong man, who was going to give an exhibition with dumb-bells. These dumb-bells were on a bar or handle, each five or six feet long, and purported to weigh two hundred and twenty-five and four hundred and fifty pounds. While lying there smoking, I noticed some boys fooling with the lighter dumb-bell—the two hundred and twenty-five weight. It was very apparent to me they were a little shy in weight, and so I got up from where I had been reclining ⁷⁹⁵ and went upon the platform where the bells had just been delivered, and picked up the large dumb-bell, said to weigh four hundred and fifty pounds; picked it up with apparent ease, but had it out of balance. It was down on the right side. I didn't get it in the center of gravity. In bringing it to a level, I raised my right arm, and something gave away with a loud report—one of the ligaments of my back." Rustin further testified that he was in good physical condition at the time he was injured; that he was accustomed to lifting and believed he could lift four hundred and fifty pounds without injury to his system; that in his opinion the heavier dumb-bell did not weigh more than three hundred pounds, and that his primary purpose in lifting it was to test its weight with the view of protecting his company and the public from an imposture which he suspected the professional athlete was about to perpetrate. This evidence, we think, was sufficient to warrant a recovery and should have been submitted to the jury. Rustin's injury, it is true, was the natural result of overexertion while attempting to raise the dumb-bell and bring it to a horizontal position; but that fact is not

of itself conclusive in favor of the company. The contract right to indemnity was not lost because the injury resulted from overexertion, unless the overexertion was conscious and intentional: *Manufacturers' Acc. etc. Co. v. Dorgan*, 58 Fed. Rep. 952; *Johnson v. London Guarantee etc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549. Surely, it cannot be said as a matter of law that the plaintiff was aware of the probable result of his act, or that he acted with a reckless disregard of consequences likely to ensue. That he failed to accurately gauge his own strength, or else to correctly estimate the weight of the dumb-bell, is evident; but accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection and a provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance. Neither is there any absolute inference that the lifting ⁷⁹⁶ was unnecessary. According to the plaintiff's testimony, the act was the product of a reasonable motive and was performed in the line of duty. An accident policy undoubtedly contemplates that even a capitalist will do some lifting without physical or moral compulsion. Circumstances in evidence discredit the reason given for the lifting, but they do not indisputably condemn it as false. The question was for the jury to determine. The judgment is reversed and the cause remanded.

INSURANCE—ACCIDENT—LIFTING.—If a person insured under an accident policy providing that it shall not cover injuries from "lifting," ruptures a blood vessel, causing death, by lifting a heavy cylinder head in the course of his employment, a recovery may be had under the policy if the application for insurance notified the insurer of the nature of the occupation of the insured: *Standard Life etc. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112. Voluntary exposure to unnecessary danger means intentional exposure to such danger: *De Loy v. Travelers' Ins. Co.*, 171 Pa. St. 1, 50 Am. St. Rep. 787.

INSURANCE. ACCIDENT.—GROSS NEGLIGENCE of the insured does not defeat recovery upon an accident insurance policy: *Lovelace v. Travelers' Protective Assn.*, 128 Mo. 104, 47 Am. St. Rep. 638.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

STATE v. GRIFFIN.

[60 NEW HAMPSHIRE, 1.]

CONSTITUTIONAL LAW—POLICE POWER.—A statute prohibiting the deposit of sawdust in the waters of a lake or any tributary thereto, thus rendering such waters unwholesome, is a proper and constitutional exercise of the police power.

CONSTITUTIONAL LAW—POLICE POWER.—A statute enacted under the police power, regulating the use of property and affecting injuriously individual rights and interests, does not entitle the person thus affected to compensation, when no part of his property is taken.

CONSTITUTIONAL LAW—EQUAL RIGHTS.—A law that confers equal rights on all citizens of the state, or subjects them to equal burdens and inflicts equal penalties on every person who violates it, is an equal law and valid, though no one can enjoy the right, be subjected to the burden, or infringe its provisions without going to or being in a particular part of the state.

CONSTITUTIONAL LAW—STATUTE RELATIVE TO A PARTICULAR PLACE.—The legislature may, in the exercise of the police power, constitutionally pass a general law in relation to a particular place in the state.

O. E. Branch, for the appellant.

Drury & Peaslee and E. F. Jones, for the appellee.

²² CARPENTER, C. J. "If any person shall throw, place, leave, or cause to be thrown, placed, or left any sawdust in Lake Massabesic, situated in Auburn and Manchester, or in any stream tributary thereto, he shall be punished for the first offense by a fine not exceeding twenty dollars, or by imprisonment not exceeding thirty days, or both; and for any subsequent offense by a fine not exceeding one hundred dollars, or by im-

prisonment not exceeding six months, or both": Laws 1891, c. 26, sec. 1. The complaint is founded upon this statute. The circumstance that the defendant holds the mill under a lease from the city of Manchester and the stipulations of the lease are immaterial. The city cannot exempt the defendant from the operation of ²³ the statute. The only defense is that the act is unconstitutional. The defendant claims that it is in conflict with the constitution for three distinct reasons, namely, because: 1. It deprives him of his property without compensation; 2. It is an exercise not of legislative but of judicial power; and 3. It is not an equal and uniform law applicable equally to all persons similarly situated, but operates only against those engaged in a particular business in a particular part of the state.

"It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.

"It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe

limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for carrying on of noxious or offensive trades; to prohibit ²⁴ the raising of a dam and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations injurious to health and dangerous to life.

“Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, *Sic utere tuo ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain”: *Commonwealth v. Alger*, 7 Cush. 53, 84-86. The universal doctrine on the subject is nowhere more clearly stated than in the foregoing language of Chief Justice Shaw. It has been often applied and never questioned in this state.

In *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611 (decided in 1854, when the keeping for sale of intoxicating liquor was not unlawful), it was held that a city ordinance, adopted under legislative authority, prohibiting the keeping of liquors in

"any refreshment room or restaurant for any purpose whatever" was constitutional. In *State v. Noyes*, 30 N. H. 279, it was held that the statute declaring a "bowling-alley situate within twenty-five rods of any dwelling-house, store, shop, schoolhouse, or place of public worship" to be a public nuisance (Laws 1845, c. 245), was constitutional, although it deprived the defendant of the use of a bowling-alley lawfully built if not put in operation before the statute took effect. It was not suggested by the defendant's counsel that the act was invalid for the reason that the defendant was deprived of that use of his property without compensation. In *State v. Freeman*, 38 N. H. 426, 428, a city ordinance prohibiting restaurants to be kept open after 10 o'clock at night was held valid. Bell, J., says: "It is an unavoidable consequence of city ordinances that they in some degree interfere with the unlimited exercise of private rights which were ²⁵ previously enjoyed. It is one thing to deprive a party of his rights and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in any way with the private right to carry on and manage his lawful business at such time and place and in such manner as suits himself, we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours. The guaranty of the constitution is just as effective to secure the citizen against the interference of the legislature as of the city council; and it has never been questioned that the legislature may constitutionally pass laws materially interfering with the business of individuals." In *Morey v. Brown*, 42 N. H. 373, 375, an act providing that no one should be liable for killing a dog found without a collar, etc., was held constitutional. Bartlett, J., says: "The plaintiff claims that the act is in conflict with our constitution; but we do not think so. It is not, as he argues, an act to take private property for public uses, or to deprive parties of their property in dogs; but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish." A statute prohibiting the sale of goods by any person outside his usual place of business, within two miles of a public assembly convened for religious worship (Gen. Stats., c. 255, sec. 9), is constitutional: *State v. Cate*, 58 N. H. 240.

“Vice, pauperism, and crime may be suppressed and prevented by a variety of measures. In behalf of property, health, life, and morals, the social contract may be performed by destroying buildings, burglars’ tools, gambling and counterfeiting implements, and intoxicating liquors. The spread of fire and physical, mental, and moral disease may be stopped by vigorous action. Destruction may be protection. For the common security, by the judgment of his peers and the law of the land, an offender may be deprived of his estate, liberty, and life. Wrong may be obstructed and repressed by methods less severe than capital punishment. The protective power may seek, by mild courses, to lessen an evil or check its increase. Instead of destroying the life, liberty, or property of wrongdoers, it may discourage their noxious business and restrain it within certain bounds”: *State v. United States etc. Exp. Co.*, 60 N. H. 219, 257. “The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the state; and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity. . . . The state has authority to make regulations as to the time, mode, and circumstances ²⁶ under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property”: *State v. White*, 64 N. H. 48, 50. In *State v. Campbell*, 64 N. H. 402, 403, 10 Am. St. Rep. 419, a statute prohibiting the sale of milk containing less than a specified per cent of milk solids, though perfectly pure and wholesome, was held valid. The court say: “Under what is generally called the police power of the state, . . . the sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery, and dentistry, the licensing of druggists, and the sales of drugs and medicines, are regulated, and the sale of spirituous or intoxicating liquors prohibited, by statute. . . . Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort, and safety of all persons; and for securing this purpose persons and property are subjected to many restraints and burdens. They are presumed to be rewarded by

the common benefits secured”: *Bancroft v. Cambridge*, 126 Mass. 438, 441. In *Mugler v. Kansas*, 123 U. S. 623, 664, 670, it was held that the owners of breweries that were made worthless by a statute forbidding the manufacture of malt liquors were entitled to no compensation for the practical destruction of their property.

Any conceivable statute enacted under the police power and regulating the use of property must necessarily affect injuriously individual rights; but in no instance, so far as known, has it been declared by a court of last resort that persons whose interests are so affected are entitled to compensation. Under the law of eminent domain no one is entitled to compensation for injuries, however serious they may be, caused by public improvements, if no part of his lands or property is taken therefor: *Kennett's Petition*, 24 N. H. 139, 143; *Petition of Mt. Washington Road Co.*, 35 N. H. 134, 146, 147.

The objection that the act is judicial in its character—that in enacting it the legislature exercised judicial power—has no better foundation: *Merrill v. Sherburne*, 1 N. H. 199, 203, 204, 8 Am. Dec. 52. The precise question was considered and decided in *State v. Noyes*, 30 N. H. 279, 294, 295, where it was held that the statute declaring bowling-alleys situated within twenty-five rods of a dwelling to be public nuisances was not for this reason unconstitutional. Bell, J., says: “It is objected to this law that, if otherwise constitutional, it is forbidden by the constitution because it undertakes to determine questions of fact and law, and is judicial in its character. What is or is not a nuisance is a judicial question, it is said, to be determined by courts, and this is clearly so. Nothing is a nuisance unless it is made such by the ²⁷ law, and to determine what is by the law a nuisance is an exercise of judicial power. But the legislature do not exceed their legitimate authority when they make a change of the law, and constitute that an offense which was not such before, nor when they make certain acts an offense of a particular kind within which they were not previously included. There may be an apparent unfitness sometimes in such legislation, but its validity has never been questioned. . . . It may be said that a bowling-alley is not of itself a nuisance, since it may either remain unused or it may be used only as a place of innocent amusement; that its injurious character depends upon the improper use alone. But the legislature may well determine that an instrument which tends to facili-

tate vicious practices is of itself an evil which ought to be prohibited. There seems to us, then, to be no sound foundation for this exception": Farnum's Petition, 51 N. H. 376, 380, 381.

The instances are numerous in which acts and things not nuisances at common law and in themselves harmless and inoffensive or even beneficial, and only liable to become offensive to the public health or comfort by improper use, have been by statute declared nuisances. Such legislation, whenever brought in question, has been sustained by the courts: Pub. Stats., c. 108, secs. 8, 10, 12, 15; *State v. Wilson*, 43 N. H. 415, 420, 82 Am. Dec. 163. The following are a few out of many early examples of such legislation: The act of April 6, 1781, against permitting swine to go at large in Portsmouth (Laws 1789, p. 174); of February 28, 1786, forbidding gunpowder in excess of ten pounds to be kept in private houses in Portsmouth (Laws 1789, p. 184); of January 3, 1792, forbidding the erection or occupation of slaughter-houses or houses for currying leather or trying tallow in the compact part of any town (Laws 1797, p. 194); of January 14, 1795, against permitting horses, etc., to go at large without fetters (Laws 1797, p. 340); of February 18, 1794, forbidding gunpowder in excess of ten pounds to be kept in private houses or in vessels at the wharves in Portsmouth (Laws 1797, pp. 359, 360); of June 16, 1791, against permitting swine to go at large in any town without being yoked and ringed, or at all, in Portsmouth (Laws 1797, p. 370); of June 16, 1792, prohibiting the casting of gravel, stones, ashes, etc., into Portsmouth harbor (Laws 1797, p. 391); of June 22, 1786, prohibiting the setting of gill nets in Ammonoosuc river (Laws 1797, p. 402); of January 9, 1795, prohibiting seines, nets, and pots in Connecticut river (Laws 1797, p. 404). The act of October 19, 1887 (Laws 1887, c. 77; Pub. Stats., c. 205, sec. 4), declaring any building used for the illegal sale of spirituous or malt liquors, wine, or cider to be a common nuisance, has been sustained by many decisions. Whether a statute restricting individual rights that is enacted for the purpose of protecting the public health may be declared²⁸ unconstitutional and void because in the opinion of the court it has no such effect is a question not raised. It is found that the tendency of sawdust in the water is to render it unwholesome. It is needless to pursue the subject. It is enough to say that this objection cannot be sustained without overruling *State v. Noyes*, 30 N. H. 279.

The principal ground relied upon is that the act is local in its operation. It is not, it is said, equal and uniform, and does not apply to all persons similarly situated. It operates, it is urged, against a class only and those engaged in a particular occupation in a part only of the state. It is said that "if the water supply of Manchester needs a sawdust law, the water supplies of other towns in the same situation need the same law. If an infusion of sawdust is unwholesome for the people of Manchester it is unwholesome for other people. . . . If Massabesic can be selected by a state law for protection unknown elsewhere, the well of a Massabesic farmer can be protected by a penal enactment applicable to no other well. . . . All wells, springs, and brooks from which the owners and their families take their supply of water for domestic purposes are equally entitled to protection. A statute making it a felony or misdemeanor to put sawdust or other substance in the well of A B in Haverhill, and leaving all other wells in the state protected by the common law alone, would be valid if the act of 1891 is valid in giving Manchester a protection against sawdust that is not given to anybody else in the same situation. Under a state law equality is a right, or the construction repeatedly put upon the constitution from 1827 to the present time is a false pretense."

In other words, it is claimed that a general law applicable to a particular place or not applicable throughout the entire state is unconstitutional. The legislature cannot make an act a penal offense in one locality, as a city, town, or other place, where for the public welfare the legislation is necessary, without also making it penal in all other parts of the state, though in none of them is the protection necessary or desirable. It cannot forbid the killing of the few deer found in the small and scattered forests of Cheshire county without also forbidding it in the vast wilderness of Coos, though there they become so numerous as to be a pest. It cannot protect the wells of Haverhill, where the state of society makes protection necessary, without extending it to all other wells, although they need no protection. It cannot confer an authority upon one town which it does not give to all. Legislation required for the public good in Strafford county must be made applicable to Grafton, though there it is injurious. The acts for the protection of the Dustin monument (Laws 1874, c. 45) and of Corbin park (Laws 1895, c. 258) are unconstitutional and void. If, however, the words "or any ²⁹ other like monument in the

state or any other like park in the state" were added, though no other such monument or park exists, the statutes would be valid; that is to say, the constitutionality of a statute may depend upon the presence or absence of words that in practical effect are immaterial.

If this is sound constitutional law, more than a thousand invalid statutes have been enacted since the adoption of the constitution. In numerous instances rights under them have been enforced, and punishment for their violation has been inflicted by judicial action. Not one in a hundred of such cases appears in the reports, and in two only of the reported cases (Scott v. Willson, 3 N. H. 321, and Charter of Manchester, 47 N. H. 277) was this objection taken, in both of which it was overruled. In all this class of cases for more than a hundred years our courts have administered to the people gross injustice instead of constitutional justice.

No clause in the constitution condemning such legislation is pointed out. No judgment of the court declaring it invalid is cited. No such decision can be found. The sole argument of the defendant in support of his position is that the act is inconsistent with "the equality of right which the constitution secures to all—that it discriminates in favor of some citizens to the detriment of others."

The argument is without foundation in fact. The statute makes no discrimination. It does not permit some persons and forbid others to put sawdust in the lake. Everybody is prohibited. "Any person," says the statute, who puts sawdust in the lake shall be punished. True it is that the prohibition affects the owners of sawmills on the lake shore more seriously than the farmers, and it affects the farmers there dwelling more seriously than the farmers of Coos. Such is necessarily the effect of all restrictive laws. They affect some persons more than others. A similar objection might be made against the larceny law. It has no effect upon the great body of the people, but upon a small class only, namely, the thieves. In the sense of the defendant's argument, it is as unequal as the sawdust law.

The act confers upon Manchester or its citizens no individual or exclusive right or benefit, within the meaning of the constitution. Every inhabitant of the state is entitled to enjoy the benefits conferred by the statute on complying with the necessary conditions, as he may, if he choose, enjoy the benefit of the aqueduct itself or of any other property taken for the pub-

lic use. If this act violates the law of equality prescribed by the constitution because only the fifty thousand inhabitants of Manchester are directly benefited by it—because to reap its benefit a person must go to Manchester—all acts authorizing the condemnation of private property for aqueducts, cemeteries, or ³⁰ other public uses, which from their nature can be enjoyed only in the towns and cities where they are located, are equally invalid. It is impossible to hold that the legislation in the latter case is for the public good, and that it is not in the former.

The equality of the constitution is the equality of persons and not of places—the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens and inflicts equal penalties on every person who violates it, is an equal law, though no one can enjoy the right, be subjected to the burden, or infringe its provisions without going to or being in a particular part of the state. It does not discriminate in favor of some at the expense of others.

There are places regarding which any protective legislation must necessarily be special—as, for example, Corbin park and the state house yard: Laws 1883, c. 12; Pub. Stats., c. 7, sec. 5. If general in form, it would be special in substance. There are few, if any, towns, cities, or other subdivisions of the state whose situation and circumstances are so nearly alike that legislation may not be required for one that is not necessary or desirable for any other. Many may be so differently situated that legislation essential for one would be injurious to the others.

No two cities in the state are governed by exactly the same ordinances. Acts made penal offenses in some cities are innocent in others. No two charters are alike. Some cities have over them a police commission, while others select and control their police officers. Their authority and their ordinances differ in many particulars. So it is, in perhaps a less degree, with towns. Many have been given authority which others do not possess. Their by-laws (Pub. Stats., c. 40, secs. 7, 8) are not uniform. Acts forbidden in some towns are permitted in others.

It is said that this lack of uniformity results “from the exercise of limited powers of local government granted to towns and cities,” and therefore has no bearing on the present ques-

tion. In the first place, it is not, as a matter of fact, altogether a result of local ordinances and by-laws; much of it is created by the direct action of the legislature, as, for example, in the creation of police commissioners and in conferring special powers upon particular towns. In the next place, acts under a delegated power are the acts of the principal. The principal cannot confer upon his agent a power which he does not himself possess. Whatever by-laws and ordinances the legislature can lawfully authorize towns and cities to adopt, it has the constitutional power to enact directly: *Wooster v. Plymouth*, 62 N. H. 193, 208-210; *State v. Noyes*, 30 N. H. 279, 293. The legislature may at any time resume the delegated powers: *School Dist. v. Smart*, 18 N. H. 268, 273; *Lisbon v. Clark*, 18 N. H. 234; *Stevens v. Dimond*, 6³¹ N. H. 330, 331; *State v. Hayes*, 61 N. H. 264, 335; *Berlin v. Gorham*, 34 N. H. 266, 275. If the legislature is by the constitution forbidden to enact such laws, it cannot authorize towns and cities to enact them. It cannot confer a power it does not itself possess.

It is not for the court to inquire into the wisdom or unwisdom of such legislation. Whether the act "be wise, reasonable, or expedient is a legislative and not a judicial question. The legislature is as capable of determining the question of the wisdom, reasonableness, and expediency of the statute, and of the necessity for its enactment, as the courts. The only inquiry is whether the statute conflicts with the constitution": *State v. Marshall*, 64 N. H. 549, 550; *Farnum's Petition*, 51 N. H. 376, 378. The question is one of constitutional power.

It is not easy to see how a requirement that all general statutes shall be made applicable equally to all similarly situated portions of the state could be given practical effect unless the legislature were made the final and exclusive judge of what places, towns, or cities are so situated: *Cooley's Constitutional Limitations*, 4th ed., 156, note. It is a question of fact. Is it to be determined by a jury, and the validity or invalidity of the statute made to depend upon their verdict? *State v. Campbell*, 64 N. H. 402, 404, 10 Am. St. Rep. 419.

The question is concluded by our decisions. In *Scott v. Willson*, 3 N. H. 321, 328, decided in 1825, it was held that an act regulating the mode of putting pine timber into Connecticut river was not repugnant to the constitution, for the reason that it "does not embrace all rivers, but is confined to Connecticut river." Richardson, C. J., says: "It has been

decided in Massachusetts that an act attempting to suspend the operation of a general law in relation to a particular person was unconstitutional: *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174. But that decision has no bearing upon the question to be decided in this case. Here the objection is not that the law does not extend to all persons, but that it does not extend to all places. The objection in truth is that the statute is a general law in relation to a particular place. But we have been referred to no clause in our constitution which restrains the legislature from passing such a law; nor have our researches enabled us to find any such clause." Chief Justice Richardson and his associates thought the proposition so obviously sound as to require no elaboration. It is needless to say that nothing is to be found in Opinion of the Justices, 4 N. H. 565, inconsistent with this doctrine.

In *Charter of Manchester*, 47 N. H. 277, 279, decided in 1867, it was held that an act requiring the check-list in the city of Manchester to be regulated in a different manner from that prescribed by the general law in all other places, towns, or cities was not for ³² that reason unconstitutional. Sargent, J., says: "But it may be said that the rule should be uniform and administered alike in all places. There might be more weight in this objection if all the other attendant circumstances were the same. We by no means intimate an opinion that the legislature might not constitutionally impose these duties relative to the check-list upon one set of officers in some towns and counties and upon a different board in other towns and counties. The legislature may constitutionally pass a general law in relation to a particular place: *Scott v. Willson*, 3 N. H. 321, 328; *State v. Noyes*, 30 N. H. 279. So general statutes have been passed in regard to schools in Portsmouth and in Somersworth, differing widely from the general law relating to schools in other parts of the state: *Comp. Stats.*, cc. 80, 81. But when we consider the difference between the wards of a city and towns not connected with any city, we see at once that there is such a difference in circumstances as may well justify a difference in the board selected to perform these duties, if such a justification were necessary." The question was directly involved in *State v. Franklin Falls Co.* (1870), 49 N. H. 240, 6 Am. Rep. 513. It was there held that the statute (*Gen. Stats.*, c. 251, sec. 20) prohibiting the maintenance of dams on the Winnipiscogee river (and five others) was constitutional. The objection that the statute was local in its ap-

plication was not alluded to either by counsel or the court, and for the reason, undoubtedly, that they understood that it was not tenable—that the question was not an open one. The same is true of *State v. Roberts* (1879), 59 N. H. 256, 484, 47 Am. Rep. 199, where the defendant was indicted, convicted, and presumably punished for taking trout from his own pond, under a statute prohibiting the taking of trout in certain months from any waters of the state except certain lakes and a certain pond. So, also, of *Purinton v. Ladd*, 58 N. H. 596, / which was debt for the penalty under the same statute: *Laws 1872, c. 55*.

The latest judicial declaration bearing upon the question is found in *Opinion of the Justices*, 66 N. H. 629, 665, where it is said that “a special act is not to be declared void because it is opposed to a spirit supposed to pervade the constitution, but not made an operative part of it by express words or necessary implication, that is, by fair construction.”

Until 1864 deposits in savings banks were taxed to the depositors like other property: *Rev. Stats., c. 39, sec. 3; Comp. Stats., c. 41, sec. 4; Laws 1864, c. 4028*. By the act of 1864 the banks were required to pay a tax of three-fourths of one per cent on the deposits, to be in full of all taxes on the depositors on account of the deposits. In 1869 the tax was increased to one per cent (*Laws 1869, c. 4, sec. 3*), and so it remained until 1895, when it was reduced to three-fourths of one per cent: *Laws 1895, ³³ c. 108*. This was a heavy discrimination in favor of the depositors: *Bank v. Concord*, 59 N. H. 75, 78. They were required to pay in many towns less than one-half the tax assessed on other property. Yet notwithstanding the express provisions of the constitution, by which the general court may “impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and residents within the said state, and upon all estates within the same” (article 5), require, “in order that such assessments may be made with equality,” that a valuation of the estates be taken anew once in every five years (article 6), and declare that “every member of the community . . . is bound to contribute his share” of the public expense (*Bill of Rights, art. 12*), and notwithstanding the numerous judicial decisions thereon (*State v. Pennoyer*, 65 N. H. 113, 114), this court, in 1883, less than twenty years after the enactment creating the discrimination, declared that “the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is

universally understood to have acquired the position of an exception to the constitutional rule of equality": Boston etc. R. R. Co. v. State, 62 N. H. 648, 649. How did it become an exception? Solely by virtue of the statute creating it and less than twenty years of public acquiescence.

In *Morrison v. Manchester*, 58 N. H. 538, 551, 552 (decided in 1879), the court said: "In this state the taxability of money at interest is not an open judicial question. Whether the assessment of money at interest is a process of ascertaining the lender's or the borrower's just share of the public expense, or an exceptional, double, or otherwise wrongful taxation of the borrower permitted—not required—by an erroneous constitutional construction established by legislative usage and judicial recognition, we need not inquire. If the assessment of a creditor for his interest-bearing loan of money is, in effect, either a double taxation of his debtor or a taxation of the debtor for property which, by conveyance or destruction, has ceased to be his, such taxation is sustained by the authority of precedent. . . . The precedent is too firmly established to be overthrown by any other authority than that of making laws." In other words, a legislative usage for something less than one hundred years, accompanied by judicial recognition, is sufficient to establish a rule of taxation forbidden by the constitution. "Local self-government . . . in uninterrupted operation more than two hundred and forty years has been constitutionally established by recognition and usage": *Doe, C. J., in State v. Hayes*, 61 N. H. 264, 322. "When a question arises as to the contemporaneous meaning of the terms used in an ancient instrument, early and long-continued usage has a controlling weight": *The Dublin Case*, 33 N. H. 459, 512; *Pierce v. State*, 13 N. H. 536, 573; ³⁴ *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, 459; *Copp v. Henniker*, 55 N. H. 179, 209, 20 Am. Rep. 194; *King v. Hopkins*, 57 N. H. 334, 356; *Keniston v. State*, 63 N. H. 37, 38, 56 Am. Rep. 486.

Immediately upon the adoption of the constitution in 1784 the legislature (many members of which, and of succeeding legislatures, were members of the convention and participated in framing the constitution) began to enact general laws applicable to particular places. They have continued to do so from that time to this—more than a hundred years. There have been few, if any, legislative sessions during which one or more statutes of this character have not been enacted. Their

number is very great. They have been sanctioned by judicial decisions. Not a dictum or intimation against their validity is to be found in our reports; nor, it is believed, in those of any other state, in the absence of express constitutional prohibition. They have been acquiesced in by the public. Under them rights have accrued and have been enforced. Many persons have been punished for violating them. It is not claimed that such legislation is expressly forbidden. Conceding (for sake of the argument) that it is unwise and opposed to the general spirit of the constitution, this long-continued usage, recognition, and acquiescence must (even if there were no judicial decision on the subject), under our established doctrine of constitutional construction, be held decisive upon the question of legislative power.

“Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens or be confined to particular classes, as minors, married women, bankers, or traders, and the like. The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another, or call for different taxation and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The business of common carriers, for instance, or of bankers may require special statutory regulations for the general benefit, and it may be matter of public policy to give ³⁵ laborers in one business a specific lien for their wages when it would be impracticable or impolitic to do the same by persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which

they apply; and they are then public in character, and of their propriety and policy the legislature must judge": Cooley's Constitutional Limitations, 6th ed., 479-481.

Appeal dismissed.

All concurred.

CONSTITUTIONAL LAW—GENERAL STATUTES.—It is not essential to the validity of a police regulation that its provisions should be applicable to all parts of a commonwealth: *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694. A law which relates to a certain relation or condition, and operates upon all standing in that relation or condition, is a general and not a special law within constitutional inhibitions against special legislation: See the extended note to *State v. Ellet*, 21 Am. St. Rep. 781, 782.

POLICE POWER—COMPENSATION FOR INJURIES.—Police regulations directing the use of private property are not void, although in some measure they may interfere with private rights without providing compensation therefor: *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579.

WHIDDEN v. CHEEVER.

[69 NEW HAMPSHIRE, 142.]

POLICE POWER—HEALTH OFFICER—LIABILITY FOR QUARANTINE.—A health officer, acting in good faith and within his statutory authority, is not liable for quarantining a dwelling-house infected with smallpox and in allowing persons sick with that disease to remain there, or in prohibiting the inmates who were not sick from leaving and others from entering.

C. Page, for the plaintiff.

T. E. O. Marvin and Frink & Marvin, for the defendant.

¹⁴² CLARK, J. The plaintiff seeks to recover damages of the defendant, who was the physician member of the board of health of the city of Portsmouth, for using his dwelling-house and buildings for smallpox patients, and for confining him to the premises against his will and exposing him to contagion from March 24 to May 14, 1894. The house was situated on the Lafayette road in Portsmouth, about three miles from the city, and was occupied by one Wright, under a lease, the plaintiff reserving certain rooms of the house for the separate use of himself and his sister. Members of Wright's family were afflicted with the smallpox. The defendant thereupon took charge of these sick persons and the buildings, established a quarantine, ¹⁴³ and posted notices upon the outside of the house

forbidding any person to leave or enter it. The plaintiff, who was not ill, protested against his confinement to the buildings and the use made of his premises, and requested the defendant to remove the patients to a pesthouse. He was confined by the defendant until the quarantine was raised, and was then released. The question is, whether upon these facts this action can be maintained.

If the defendant, as a health officer, acted within the limits of his authority and in good faith, he is not liable for errors of judgment; but it is well settled that such an officer is liable for acts in excess of his authority: *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334; *Brown v. Murdock*, 140 Mass. 314. The statute defining the powers and duties of health officers during the prevalence of the smallpox and other pestilential diseases provides that: "The health officers may remove any person infected with the smallpox . . . to some suitable house provided by them for that purpose, if it can be done without endangering the life of the person; and they may make such regulations respecting such house and for preventing unnecessary communication with such persons or their attendants as they may think proper": Pub. Stats., c. 110, sec. 2. "If any person shall break out with the smallpox, and the health officers shall judge that he may remain without endangering others than his own family, they may give license to persons who have been exposed to the danger of taking the disease to be inoculated and to remain in the same house, subject to such regulations as they may impose": Pub. Stats., c. 110, sec. 5.

Statutes enacted for the preservation of the public health are to receive a liberal construction. The powers conferred upon local boards of health are quite extensive when the public health or comfort demands it. The case does not show whether the lives of those sick with the smallpox would have been endangered by their removal to a pesthouse. Upon this question the decision of the health officers, acting in good faith, would have been final; and, as there is no imputation of bad faith, it may be assumed that, in the opinion of the health officers, the lives of the patients would have been endangered by their removal. The defendant did what he was authorized to do by the statute. He allowed the sick persons to remain in the house, and that was the extent of the possession exercised by him. In forbidding inmates of the house not afflicted with the smallpox to go abroad, and persons from abroad to

enter, he conformed to the usual practice: *Farmington v. Jones*, 36 N. H. 271; *Wilkinson v. Albany*, 28 N. H. 9.

That part of the house where four persons lay sick with the smallpox and one died was held by the plaintiff's tenant under ¹⁴⁴ a lease, and the plaintiff would have no cause of action for a disturbance of the possession unless his interest was in some way affected. The defendant's possession of the house consisted in allowing the sick persons to remain there, and in prohibiting the inmates who were not sick from leaving, and others from entering, and this he had authority to do under the statute. It does not appear that the defendant was ever in that part of the house reserved for the use of the plaintiff, or that he attempted to exercise any control over it, except to prohibit the plaintiff from going abroad and endangering the health of the community. This he was authorized to do, under the provisions of the statute and as a reasonable police regulation for the protection of the public health. There was no taking of property for public use without compensation. It was merely the exercise of a reasonable health regulation under the police power of the state, within the limitations of the statute.

Such regulations as are reasonably calculated to preserve the public health are valid, though they may abridge individual liberty and rights of property: 1 *Dillon on Municipal Corporations*, sec. 326. There is nothing in the case to show that the defendant did anything he was not authorized to do, or that he did not act in good faith within the limits of his statutory duty, as he understood it. Notwithstanding the plaintiff's restriction to the premises and his exclusion from association with the community during the prevalence of the disease to which he was exposed, the defendant is not liable to him in damages. There is nothing in the case which shows that the defendant did not act in good faith and within the limits of his statutory duty.

Case discharged.

All concurred.

QUARANTINE—LIABILITY OF HEALTH OFFICERS.—Health officers acting within the limits of their authority are not liable for the consequences of a mistake of judgment when proceeding with good faith and reasonable caution: See the extended note to *Hurst v. Warner*, 47 Am. St. Rep. 548. The subject of quarantine regulations is further treated in the note to *Markham v. Brown*, 92 Am. Dec. 76-80.

CLARK v. PARSONS.

[69 NEW HAMPSHIRE, 147.]

LIMITATIONS OF ACTIONS—COTENANCY.—The statute of limitations does not begin to run against a tenant in common of a remainder until the termination of the life estate, and if his cotenant owns the life estate, his possession cannot be adverse until the termination of such estate.

ESTATES—MERGER.—A life estate merges in the remainder only to the extent of the interest of the life tenant in such remainder.

ESTOPPEL.—REMAINDERMEN who stand silent while a life tenant, believing that he owns the property in fee, makes permanent improvements on the estate, are not thereby estopped to assert their title after the termination of the life estate, when the situation of the title is shown by the records, and the information in regard to it is equally open to both parties.

Bill in equity to remove a cloud upon plaintiff's title to a parcel of land of which defendant claims to own an undivided one-half. In 1820, one Parsons conveyed the premises in question to Amos S. Parsons by warranty deed. Amos had three sons, Joseph, James, and Isaac, and by his will gave the premises in dispute to Joseph for life, with remainder to James and Isaac. Isaac afterward died, leaving two sons, William and Lewis. In 1865, Joseph and James Parsons conveyed the land in dispute to one Berry, under whom the plaintiff claims, through mesne conveyances. Plaintiff received his conveyance in 1891, and has occupied the premises ever since. All of the conveyances were by warranty deed. In 1876, Isaac's sons, William and Lewis, conveyed to defendant all their title and interest to the lands of which Amos died seised, and these deeds were immediately recorded. The defendant was acquainted with the land and the title thereto long before he purchased in 1876. He also knew that permanent improvements were being made on the premises, but he never claimed until after the death of the life tenant that he owned one-half of the land.

S. W. Emery, for the plaintiff.

C. Page and W. H. Sawyer, for Knox and Stone.

Frink & Marvin, for the defendant.

¹⁵⁶ WALLACE, J. The plaintiff has not acquired title to the premises by adverse possession as against the defendant, nor did the statute of limitations begin to run against an ac-

tion for possession until the death of the life tenant, Joseph, in 1891: *Foster v. Marshall*, 22 N. H. 941; *Bodwell v. Nutter*, 63 N. H. 446, 448; *Mixter v. Woodcock*, 154 Mass. 535.

But it is urged that Isaac or his sons might, at any time after the deed to Berry by Joseph and James, December 14, 1865, have maintained an action to establish their title to the remainder according to the doctrine of *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514. That case only gives the remainderman the right to establish his title when it is questioned. It is a right of which he may avail himself, or not, as he may elect. If he does avail himself of it and the controversy is decided in his favor, it gives him no right to the possession or to a writ of possession during the existence of the life estate. Until the termination of the life estate no right of entry or right of possession exists in favor of the reversioner. Until the right of entry and the right of possession to the property accrue, the statute of limitations does not begin to run against an action for the possession.

It is claimed that when the life estate and the estate of one tenant in common of the remainder were granted to Berry, a merger of the life estate in the fee was effected by the coincidence of the two estates in one person, and that the life estate in the entire property was thereby extinguished. It is a sufficient answer to say that the life estate in the undivided half of the remainder belonging to Isaac could not merge in the undivided half of the remainder belonging to Berry; neither could the conveyance of the life estate to Berry, construed as a surrender, inure to the benefit of Isaac or those who claim under him. "Merger is coextensive with the interest merged, as in the case of joint tenants and tenants in common; and it is only to the extent of the part in which the owner has two several estates. An estate may merge for one part of the land and continue in the remaining part of it": 4 Kent's Commentaries, *100, *101; *Clark v. Clark*, 56 N. H. 105, 113; *McLaughlin v. McLaughlin*, 80 Md. 115.

¹⁵⁷ Another question which arises is whether the defendant is estopped by his silence to assert his title to the land in question. The general principle of estoppel in pais is, that where one by his words, conduct, or silence "causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time": *Pickard v. Sears*,

6 Ad. & E. 469; Corbett v. Norcross, 35 N. H. 99; Richardson v. Chickering, 41 N. H. 381, 77 Am. Dec. 769; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; Stevens v. Dennett, 51 N. H. 324; Allen v. Shaw, 61 N. H. 95. It is essential to the application of this principle that the party setting up the estoppel be ignorant of the truth of the matter in regard to which he claims he has been misled, and induced to act to his injury by the conduct or silence of the party to be estopped. If he was fully acquainted with the facts of the case, there would be no estoppel. In respect to the title to real estate, if the party claiming the estoppel is acquainted with the true state of the title, or has an equal means with the other party of ascertaining it, as in the case of a duly recorded deed, there will be no estoppel, at least from mere silence: Odlin v. Gove, 41 N. H. 465, 477, 77 Am. Dec. 773; Wood v. Griffin, 46 N. H. 230, 237; Allen v. Shaw, 61 N. H. 95; Jones v. Aqueduct, 62 N. H. 488; Brant v. Iron Co., 93 U. S. 326, 337.

The plaintiff claims that the defendant is estopped to assert title to the premises, because after he acquired the title he remained silent while the plaintiff made some permanent improvements. The situation of the title was shown by the records, and the information in regard to it was equally open to both parties. Although the plaintiff and those under whom he claims had no actual knowledge of the defect in their title, they had by the records constructive notice of it. Their failure to examine the records was not caused by anything said or done by the defendant. They might and should have informed themselves as to the title of the premises before purchasing or making permanent improvements. Their failure to do so was their own fault, and they cannot resort to an estoppel based upon the defendant's silence to avoid the consequences of their own negligence.

It is not found, nor does it appear, that the plaintiff will be injured by the defendant's assertion of his title. Upon partition of the entire common property, it may be that the defendant's share can be assigned to him without affecting the plaintiff's title to his improvements: Holbrook v. Bowman, 62 N. H. 313, 320, 321. Whether the plaintiff can or cannot avail himself of the betterment law is a question not considered.

Judgment for the defendant.

All concurred.

ADVERSE POSSESSION.—The possession of a life tenant is not adverse to the remainderman or reversioner: *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364. But after the termination of the life estate, if the reversioner permits the representatives of the tenant for life to hold, claiming as their own, for the time prescribed by statute, the right of recovery is gone: *Jackson v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517. The possession of one cotenant is prima facie the possession of all, though he may make his possession adverse by actual ouster or by setting up a claim in his own right to the whole tract in question: *Note to Alexander v. Gibbon*, 54 Am. St. Rep. 763.

ESTOPPEL IN PAIS.—Where the foundation for an estoppel insisted upon is the silence or omission to give notice of one's rights, the party relying thereon must not have the means of knowing the true state of facts by reference to the public records: *Note to Cook v. Walling*, 10 Am. St. Rep. 22. See, too, *Crest v. Jack*, 8 Watts, 238, 27 Am. Dec. 353.

PERRAULT v. SHAW.

[69 NEW HAMPSHIRE, 180.]

MECHANICS' LIENS.—A PERSON WHO FURNISHES BOARD TO WORKMEN employed in making brick under a contract with their employer does not perform labor nor furnish materials for making the brick, entitling him to a mechanic's lien.

D. B. Donovan, for the plaintiff.

A. E. Burbank and Albin, Martin & Howe, for the defendants.

181 **BLODGETT, J.** "If a person shall perform labor or furnish materials to the amount of fifteen dollars or more for making brick, by virtue of a contract with the owner thereof, he shall have a lien upon the kiln containing such brick for such labor or materials": Pub. Stats., c. 141, sec. 11.

The legislative purpose in the enactment of this statute evidently was to protect the laborer who performs manual work in making the brick and the person who furnishes materials which are used therefor, and such, also, is the reasonable import of the language employed in its common and ordinary signification. Assuming the correctness of this interpretation, the plaintiff fails to make a case which entitles him to the remedial advantages of the statute. At most, the board furnished by him contributed only in an indirect manner to the making of the brick. He neither performed labor nor furnished materials within the statutory contemplation, which limits the lien to

such labor performed and materials furnished as enter into and become a part of the brick: See *Bradford v. Underwood Lumber Co.*, 80 Wis. 50; *Williams v. Toledo etc. Coal Co.*, 25 Or. 426, 431, 432, 42 Am. St. Rep. 799, 802; *McCormick v. Water Co.*, 40 Cal. 185; *Dudley v. Toledo etc. Ry. Co.*, 65 Mich. 655; *Central Trust Co. v. Texas etc. Ry. Co.*, 27 Fed. Rep. 178; *Gordon Hardware Co. v. San Francisco etc. R. R. Co.*, 86 Cal. 620.

To give to the statute the elastic power claimed for it by the plaintiff would require an unnatural and strained construction which, if carried to its logical conclusion, would extend the lien indefinitely to everyone who, by virtue of a contract with the owner, contributes, however remotely, to the making of brick by any kind of service rendered or supplies furnished to the workmen which aid them in any degree to perform their labor. The obvious result of such a construction would be interminable litigation and confusion of liens, as well as materially subversive of the general principle upon which all lien laws of this character proceed, which is that those who have directly contributed by their labor, or by furnishing materials, are entitled to a lien upon the property into which the labor and materials have gone, and to that extent added to its value: *Authorities supra*; *Davis v. Alvord*, 94 U. S. 545; 15 Am. & Eng. Ency. of Law, 46, note. There is no other solid or distinct ground on which to stand.

The plaintiff has not a lien on the brick attached.

Case discharged.

All concurred.

MECHANIC'S LIEN LAW—CONSTRUCTION OF.—While a mechanic's lien law is favored and the remedial laws for its enforcement should be liberally construed, they should not be so construed as to include persons not enumerated in the statute: *Thompson v. Baxter*, 92 Tenn. 305, 36 Am. St. Rep. 85.

AM. ST. REP., VOL. LXXVI.—11

BATEMAN v. EDGERLY.

[69 NEW HAMPSHIRE, 244.]

EXEMPTIONS—PARTNERSHIP PROPERTY.—A statute exempting the tools of a debtor's occupation from attachment and execution does not apply to partnership property. Partners are entitled to exemptions only as individuals, and out of property which they individually own.

Albin, Martin & Howe, for the plaintiffs.

Streeter, Walker & Hollis, for the defendant.

245 PIKE, J. "The following goods and property are exempted from attachment and execution: 1. The wearing apparel necessary for the use of the debtor and his family; 2. Comfortable beds, bedsteads, and bedding necessary for the debtor, his wife, and children; 3. Household furniture to the value of one hundred dollars; 4. One cooking stove and the necessary furniture belonging to the same; 5. One sewing-machine, kept for the use of the debtor or his family; 6. Provisions and fuel to the value of fifty dollars; 7. The uniform, arms, and equipment of every officer and private in the militia; 8. The Bibles, school-books, and library of any debtor used by him or his family to the value of two hundred dollars; 9. Tools of his occupation to the value of two hundred dollars; 10. One hog and one pig, and the pork of the same when slaughtered; 11. Six sheep and the fleece of the same; 12. One cow; a yoke of oxen or a horse when required for farming or teaming purposes, or other actual use; and hay not exceeding four tons; 13. Domestic fowls not exceeding fifty dollars in value; 14. The debtor's interest in one pew in any meeting-house in which he or his family usually worship; 15. The debtor's interest in one lot or right of burial in any cemetery": Pub. Stats., c. 220, sec. 2.

The question raised is whether the exemption of "tools of his occupation to the amount of two hundred dollars," under clause 9, applies to partnerships.

The exemptions of the several clauses appear to have been provided as much out of solicitude for the family of the debtor as for the debtor himself. Apparently, there was an intention to limit them to debtors who are capable of forming family relations—that is, to individuals. Viewed in this light they seem

reasonable and appropriate. The character of the property exempt is suited to the needs of debtors of this class. On the other hand, provisions for a debtor's family have no application to partnerships. Partnerships may be classed with corporations in this respect. No reasonable doubt can exist that the property named in the first eight and last six clauses of the section was not intended to apply to partnerships. In most of them, property is enumerated for which partnerships have no use. In the remainder, the language and the context clearly show it has no application to them. There is nothing in clause 9 to indicate ²⁴⁶ that its provisions were intended for any different class of debtors than those provided for in the clauses which precede and follow it.

The object of the statute was to prevent individual debtors and their families from being reduced to want by securing to them some of the comforts and necessities of life for their temporary need, and tools with which the debtor may continue to earn a living. Partners are entitled to exemptions only as individuals and out of property which they individually own: *Peaslee v. Sanborn*, 68 N. H. 262. The same conclusion was reached under similar statutes in *Pond v. Kimball*, 101 Mass. 105, and *Bonsall v. Comly*, 44 Pa. St. 442.

Exception overruled.

Blodgett, J., did not sit; the others concurred.

EXEMPTIONS.—A PARTNER CANNOT CLAIM and hold firm property as exempt from execution and attachment: *Green v. Taylor*, 98 Ky. 330, 56 Am. St. Rep. 375. But see *Dennis v. Kass*, 11 Wash. 353, 48 Am. St. Rep. 880.

BUCH v. AMORY MANUFACTURING COMPANY.

[69 NEW HAMPSHIRE, 257.]

INFANCY—PRESUMPTION.—In an action by an infant to recover for an injury received by coming in contact with dangerous machinery, there is no presumption that he was incapable of appreciating the danger or of exercising the care necessary to avoid it.

NEGLIGENCE—TRESPASSERS.—An owner of premises is not bound to warn a trespasser, whether adult or infant, of hidden or secret dangers arising from the condition of such premises, or to protect him against any injury that may arise from his own acts or the acts of others.

NEGLIGENCE—INFANT TRESPASSERS.—An owner of dangerous machinery in operation in the usual course of business is under no obligation to protect an infant trespasser from injury therefrom, although such infant is incapable of appreciating the danger, or of exercising the care necessary to avoid it.

Sullivan & Broderick and Burnham, Brown & Warren, for the plaintiff.

D. Cross, D. A. Taggart, and E. M. Topliff, for the defendants.

258 CARPENTER, C. J. On the evidence, the jury could not properly find that the plaintiff was upon the premises of the defendants with their consent or permission. Although there was evidence tending to show that other back-boys had taken their brothers **259** into the room for the purpose of instructing them in the business, there was no sufficient evidence that the fact that they did so was known to the defendants, and there was evidence that on the first occasion brought to their knowledge they objected. Upon this state of the evidence, a license by the defendants—whether material or immaterial—for the plaintiff's presence in the room could not legitimately be inferred. The plaintiff was a trespasser.

The defendant's machinery was in perfect order and properly managed. They were conducting their lawful business in a lawful way and in the usual and ordinary manner. During the plaintiff's presence they made no change in the operation of their works or in their method of doing business. No immediate or active intervention on their part caused the injury. It resulted from the joint operation of the plaintiff's conduct and the ordinary and usual condition of the premises. Under these circumstances, an adult in full possession of his faculties, or an infant capable of exercising the measure of care necessary to protect himself from the dangers of the situation, whether he was on the premises by permission or as a trespasser, could not recover.

The plaintiff was an infant of eight years. The particular circumstances of the accident—how or in what manner it happened that the plaintiff caught his hand in the gearing—are not disclosed by the case. It does not appear that any evidence was offered tending to show that he was incapable of knowing the danger from putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger. Such an incapacity cannot be presumed: **Stone v. Dry Dock**

etc. R. R. Co., 115 N. Y. 104, 109-111; *Hayes v. Norcross*, 162 Mass. 546, 548; *Mulligan v. Curtis*, 100 Mass. 512, 514, 97 Am. Dec. 121; *Cosgrove v. Ogden*, 49 N. Y. 255, 258, 10 Am. Rep. 361; *Kunz v. Troy*, 104 N. Y. 344, 351, 58 Am. Rep. 508; *Lovett v. Salem etc. R. R. Co.*, 9 Allen, 557, 563.

An infant is bound to use the reason he possesses and to exercise the degree of care and caution of which he is capable. If the plaintiff could, by the due exercise of his intellectual and physical powers, have avoided the injury, he is no more entitled to recover than an adult would be under the same circumstances. The burden was upon him, and the case might be disposed of upon the ground that he adduced no evidence tending to show that he had not sufficient reason and discretion to appreciate the particular risk of injury that he incurred and to avoid it. But it may be that evidence tending to show the plaintiff's incapacity was adduced, and that the case is silent on the subject because this particular question was not made by the defendants.

Assuming, then, that the plaintiff was incapable either of appreciating the danger or of exercising the care necessary to avoid it, is he, upon the facts stated, entitled to recover? He was a trespasser ²⁶⁰ in a place dangerous to children of his age. In the conduct of their business and management of their machinery the defendants were without fault. The only negligence charged upon or attributed to them is that, inasmuch as they could not make the plaintiff understand a command to leave the premises and ought to have known that they could not, they did not forcibly eject him.

Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two year old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster: but he is not liable in damages for the child's injury, or indictable under the statute for its death: Pub. Stats., c. 278, sec. 8.

"In dealing with cases which involve injuries to children, courts . . . have sometimes strangely confounded legal obligation with sentiments that are independent of law": *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65. "It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz., that no action arises without a breach of duty": 2 Thompson on Negligence, 1183, note 3. "No action will lie against a spiteful man, who, seeing another running into danger, merely omits to warn him. To bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger they might encounter whilst using the license": *Gautret v. Egerton*, L. R. 2 Com. P. 371, 375.

What duties do the owners owe to a trespasser upon their premises? They may eject him, using such force and such only as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence—bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44, 47, 48, 31 Am. St. Rep. 520); or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner ²⁶¹ interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for any damage that he by his unlawful meddling may cause them or their property. What greater or other legal obligation was cast on these defendants by the circumstances that the plaintiff was (as is assumed) an irresponsible infant?

If land owners are not bound to warn an adult trespasser of hidden dangers—dangers which he by ordinary care cannot discover and, therefore, cannot avoid—on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which by no degree of care he can discover, and that of the infant incapable of comprehending danger, is in a legal aspect

exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other.

There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight year old boy beginning to climb into his garden over a wall stuck with spikes and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? *Degg v. Railway*, 1 Hurl. & N. 773, 777. I see my neighbor's two year old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (Pub. Stats., c. 278, sec. 8), because the child and I are strangers, and I am under no legal duty to protect him. Now, suppose I see the same child trespassing in my own yard and meddling in like manner with the dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? ²⁶² The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant by coming unlawfully upon my premises impose upon me the legal duty of a guardian? None has been suggested, and we know of none.

An infant, no matter of how tender years, is liable in law for his trespasses: 1 Chitty on Pleading, 86; 2 Kent's Commentaries, 241; Cooley on Torts, 103; Pollock on Torts, 46; 3 Addison on Torts, 1126, 1153; 10 Am. & Eng. Ency. of Law, 668 et seq.; *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec

177; *School Dist. v. Bragdon*, 23 N. H. 507; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Bullock v. Babcock*, 3 Wend. 391; *Williams v. Hays*, 143 N. Y. 442, 446-451, 42 Am. St. Rep. 743; *Conklin v. Thompson*, 29 Barb. 218; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. (*230) 237, 84 Am. Dec. 741. If, then, the defendant's machinery was injured by the plaintiff's act in putting his hand in the gearing, he is liable to them for the damages in an action of trespass and to nominal damages for the wrongful entry. It would be no answer to such an action that the defendants might by force have prevented the trespass. It is impossible to hold that while the plaintiff is liable to the defendants in trespass, they are liable to him in case for neglecting to prevent the act which caused the injury both to him and them. Cases of enticement, allurement, or invitation of infants to their injury, or setting traps for them, and cases relating to the sufficiency of public ways, or to the exposure upon them of machinery attractive and dangerous to children, have no application here.

Danger from machinery in motion in the ordinary course of business cannot be distinguished from that arising from a well, pit, open scuttle, or other stationary object. The movement of the works is a part of the regular and normal condition of the premises: *Sullivan v. Boston etc. R. R. Co.*, 156 Mass. 378; *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364; *Rodgers v. Lees*, 140 Pa. St. 475. The law no more compels the owners to shut down their gates and stop their business for the protection of a trespasser than it requires them to maintain a railing about an open scuttle or to fence in their machinery for the same purpose: *Benson v. Baltimore Traction Co.*, 77 Md. 535, 39 Am. St. Rep. 436; *Mergenthaler v. Kirby*, 79 Md. 182, 47 Am. St. Rep. 371. There was no evidence tending to show that the defendants neglected to perform any legal duty to the plaintiff: *McGuinness v. Butler*, 159 Mass. 233, 236, 238, 38 Am. St. Rep. 412; *Grindley v. McKechnie*, 163 Mass. 494; *Holbrook v. Aldrich*, 168 Mass. 15, 17, 60 Am. St. Rep. 364, and cases cited.

Verdict set aside; judgment for the defendants.

Parsons, J., did not sit; the others concurred.

THE CASE OF *Shea v. Concord etc. R. R.*, 69 N. H. 361, was an action to recover for personal injury to a child five years and nine months old, caused by his being run over by a coal car on defendants' railroad track. The evidence showed that the place of the

accident where the child was playing upon the track was where there was no passageway of any kind where either persons or carriages were accustomed to cross or approach the tracks. The court said: "The deceased was a trespasser at the time of his injury in the defendants' railway yard. There was no evidence tending to show that his injuries were wantonly inflicted, or that any of the defendants' employés knew of his presence at the time he was injured. The only question submitted to the jury was whether or not the railroad tracks at the place of the accident and prior thereto had been used to such an extent that the defendants' employés, in the exercise of ordinary care, ought to have anticipated such use on this occasion and to have discovered and warned the deceased of his danger. The single question presented is whether there was sufficient evidence to warrant the submission of the case to the jury, or whether the motion for a nonsuit and a verdict for the defendants should have been granted.

"In *Clark v. Manchester*, 62 N. H. 577, *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, and *Buch v. Amory Mfg. Co.*, 69 N. H. 257, ante, p. 163, the doctrine was followed that a trespasser meeting with an injury by reason of the dangerous condition of the premises he is invading is not entitled to recover, on the ground that a land owner is under no duty to a mere trespasser to keep his premises safe, and is liable only for an injury wantonly inflicted, or for one arising from his failure to exercise due care after discovering the danger.

"There being no evidence from which a jury could properly find that the defendants neglected to perform any duty, the motion for a nonsuit and for a verdict for the defendants should have been granted."

NEGLIGENCE.—AN INFANT between the ages of ten and fourteen years must be shown to have had capacity to comprehend and avoid danger before he can be held responsible for his acts: *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362. See, too, the monographic note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591. The law presumes that a child between seven and fourteen years of age cannot be guilty of contributory negligence: *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

INFANT TRESPASSERS—DANGEROUS PREMISES.—Liability of the owner of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed there by the owner, or with his knowledge permitted to remain thereon: *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864; *Arnold v. St. Louis*, 152 Mo. 173, 75 Am. St. Rep. 447. See, further, the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416-419.

INFANT TRESPASSERS—DANGEROUS MACHINERY.—In some jurisdictions it is held that if a child goes upon the premises of another person, and while there as a mere licensee or volunteer is injured by dangerous machinery, it cannot recover damages from the owner therefor: See the extended note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 419.

GAGNON v. DANA.

[69 NEW HAMPSHIRE, 264.]

BAILMENTS.—A GRATUITOUS lender of chattels is not liable for injury to a servant of the borrower from defects therein unknown to him, whether he ought to have known of them or not.

MASTER AND SERVANT—LOAN OF SERVANT.—If one person lends his servant to another for a particular employment, the servant, while thus engaged, is the servant of the latter.

TRIAL.—IF MOTION FOR NONSUIT based on alleged insufficiency of plaintiff's evidence is erroneously denied, and defendant introduces his evidence, supplying such deficiency, a verdict for plaintiff cannot be set aside.

Case for personal injury. One Bradley was engaged in repairing a building. Dana & Prevost were building contractors employing plaintiff, who was a carpenter. Bradley applied to Dana & Prevost for men, and plaintiff, among others, was sent by them to work for Bradley. The latter also obtained from Dana & Prevost certain wall brackets for constructing a staging upon such building. These brackets were furnished without compensation, and, while upon a staging constructed by the use of one of such brackets, the plaintiff was thrown to the ground and injured by reason of a defect in the bracket. Verdict for plaintiff and defendants appealed.

Burnham, Brown & Warren and I. W. Smith, for the plaintiff.

E. M. Topliff, D. A. Taggart, and R. E. Walker, for the defendants.

266 **BLODGETT, J.** The brackets having been loaned by the defendants for the use of the borrower, without any reward or compensation to be received by them from him, their only duty in respect of defects was to inform him of any of which they were aware, and which might make the use of the loan perilous to him or to his servants, one of whom was the plaintiff. "The ground of this obligation is that when a person lends he ought to confer a benefit, and not to do a mischief": Shirley's Leading Cases, 43, 44, and authorities generally. But the obligation of a mere lender goes no further than this, and he cannot, therefore, be made liable for not communicating anything which he did not in fact know, whether he ought to have known it or not: MacCarthy v. Young, 6 Hurl. & N. 329; Blakemore v. Railway, 8 El. & B. 1035, 1050, 1051; Shearman and Redfield

on Negligence, 3d ed., sec. 197, note; 2 ²⁶⁷ Parsons on Contracts, 5th ed., 109; 1 Addison on Contracts, *353; 2 Wait's Actions and Defenses, 268; Schouler on Bailments, sec. 79; Story on Bailments, sec. 275.

Resting upon such authority, and being so consonant to reason and justice that it cannot but be the law, the rule thus enunciated necessarily renders erroneous the reiterated instruction to the jury that the defendants might be liable for the plaintiff's injury "if they knew or ought to have known that the brackets furnished were unsafe and unsuitable for use on the building." While a gratuitous lender "must be taken to lend for the purpose of a beneficial use by the borrower," and is rightfully "responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured" (*Blakemore v. Railway*, 8 El. & B. 1035, per Coleridge, J.), it would be the grossest injustice, as well as extending the law beyond any recognized principle, to subject him to liability for defects of which he is not aware; and especially in a case like this, where the defect complained of was apparently as open to ascertainment by the plaintiff as it could possibly have been to the defendants.

The instruction that "it is not material whether anything was paid for the use of the brackets or not" was no less erroneous upon the question of the defendants' liability. While in many respects the duties and liabilities of the parties are materially different in the case of a gratuitous bailment and one for hire, it is enough for the present purpose to observe that while in the former the benefit is exclusively to the bailee, and therefore the liability of the bailor for defects in the thing loaned extends only to those which are known to him and not communicated to the bailee, in the latter, the bailment being for the mutual benefit of both alike, the bailor's obligation is, and of right ought to be, correspondingly enlarged; and it is therefore his duty to deliver the thing hired in a proper condition to be used as contemplated by the parties, and, for failure to do so, he is justly liable for the damage directly resulting to the bailee, or his servants, from its unsafe condition. This distinction is fundamental and of universal recognition.

The relation of master and servant not existing between the plaintiff and the defendants at the time of his injury, their request to have the jury specifically so instructed should have been granted. The duties and obligations of a master to his

servant in respect of tools and appliances for performing the labor for which he is engaged differ widely from those of a gratuitous lender to the borrower, and a radically different rule obtains in the one case than in the other.

The defendants' additional requests, making actual knowledge of the defect the test of their liability, should also have been given, not only because the law is so, but because under the ²⁰⁸ instructions which were given the jury might well have found that the defendants did not know of the defect and still have found them chargeable with it, on the ground that they ought to have known it.

In view of the errors to which attention has been called, it is deemed unnecessary to go farther and specifically consider other exceptions relating to the instructions given and refused; but we think it should be added that, owing to the misapprehension by the court of the obligations of the defendants to the plaintiff and of the legal relation between them, the instructions generally were not such as the case required.

The defendants can take nothing by their exceptions to the denial of their motions for a nonsuit and to direct a verdict in their favor. If, at the time the plaintiff rested, he had not adduced competent evidence to sustain a verdict in his favor (as to which no intelligent opinion can be expressed without additional facts), it is now immaterial because the defendants, instead of risking their case upon their exception to the denial of their motion for a nonsuit, went on with the trial and introduced their evidence, and the deficiency, if any, of the plaintiff's evidence was supplied by one side or the other before the case went to the jury, inasmuch as it found that at some stage of the trial there was testimony from numerous witnesses to and against the defendants' knowledge of the bracket's defective and unsound condition; so that when all the proof was in the case, there was no ground of exception for the reason of its insufficiency to sustain a verdict for the plaintiff, and this being so, it is wholly indifferent by which party the proof was introduced: *Fletcher v. Thompson*, 55 N. H. 308, 309, and authorities cited; *Oakes v. Thornton*, 28 N. H. 44, 47, per Woods, J. And this testimony also rendered the renewal of the motion at the close of the evidence unseasonable (*Brown v. Massachusetts etc. Ins. Co.*, 59 N. H. 298, 307, 47 Am. Rep. 205), and precluded the granting of the motion to direct a verdict for the defendants: *Shepardson v. Perkins*, 58 N. H. 354, 355.

The result is that the defendants' exceptions on this branch

of the case are overruled, and there other exceptions hereinbefore considered sustained.

Verdict set aside.

Clark, J., did not sit; the others concurred.

IF A MASTER SENDS HIS SERVANT to work upon the premises of a third person at the request of the latter, the master is not liable to the servant for the unsafe condition of such premises, nor is he required to care for the safety of the servant while upon them: *Channon v. Sanford Co.*, 70 Conn. 573, 66 Am. St. Rep. 133.

ERROR IN OVERRULING A MOTION FOR A NONSUIT is waived by evidence offered by the defendant in his own behalf which supplies the defect existing in the plaintiff's proofs: *Jennings v. First Nat. Bank*, 13 Colo. 417, 16 Am. St. Rep. 210.

DOW v. WINNIPESAUKEE GAS AND ELECTRIC Co.

[69 NEW HAMPSHIRE, 312.]

NEGLIGENCE—ESCAPE OF GAS—WANT OF NOTICE AS DEFENSE.—In an action to recover for injuries caused by the escape of gas from a defective pipe, it is no defense that the owners were not notified of its condition.

NEGLIGENCE—DEFECTIVE GASPIPE.—Persons who acquire title to a gaspipe immediately become chargeable, as its owners and users, with the personal duty to keep it in a reasonable condition of safety, and so use it as not unnecessarily to injure the property or endanger the safety of others, and if they fail to do so, they are liable for the consequences in the same manner and to the same extent as if they had laid the pipe themselves, and the question of their liability is not dependent upon their knowledge of the pipe's defective condition or the escaping gas, but upon the observance of or neglect of care by them.

NEGLIGENCE—DAMAGES.—A florist whose plants have been injured by the negligent escape of gas is not entitled to recover special damages for injury to his business reputation on account of his sales of damaged plants, as such damages are too speculative and remote for legitimate compensation.

Jewell & Owen, for the plaintiff.

E. A. & C. B. Hibbard, for the defendants.

314 BLODGETT, J. The defendants' contention that until notice to them there was no liability on their part for damage to the plaintiff's plants from gas escaping from a leaky pipe and penetrating and pervading his greenhouses cannot be sustained as a matter of law. It was the use of the pipe for the transmission and distribution of gas, and not the pipe itself,

that constituted the nuisance. For the mere maintenance of the pipe as such—it having been laid before the acquisition of the defendants' title and not being a nuisance per se—they might not be liable without notice; but when they acquired title to the pipe they immediately became chargeable, as its owners and users, with the personal duty or ³¹⁵ obligation cast upon them by the law to keep it in a reasonably safe condition and so use it as not unnecessarily to injure the property or endanger the safety of the plaintiff or others, and, if they failed to do so, the law properly renders them liable for the consequences in the same manner and to the same extent as if they had laid the pipe themselves: *Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89; *Coupland v. Hardingham*, 3 Camp. 398; *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 153, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355; *Jones v. Williams*, 11 Mees. & W. 176; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Joyce v. Martin*, 15 R. I. 558; *Beavers v. Trimmer*, 25 N. J. L. 97; *Cooley on Torts*, 612; *Wood on Nuisances*, sec. 268; 16 Am. & Eng. Ency. of Law, 990, 991.

Nor can the defendants protect themselves from liability for injury to the plaintiff's plants until after notice, merely on the ground that they did not in fact know the pipe was defective or that gas was escaping from it into his greenhouses. They were bound to guard against both of these things by exercising the proper care required under the circumstances; and unless they did exercise such care, they are responsible for any resulting injury irrespective of notice. In other words, the question of the defendants' liability is not dependent upon their knowledge of the pipe's defective condition or the escaping gas, but upon the observance or neglect of care by them: *Monroe v. Connecticut River Lumber Co.*, 68 N. H. 89; *Garland v. Towne*, 55 N. H. 55, 57, 20 Am. Rep. 164; *Cooley on Torts*, 570; and as it is found that "there was no evidence that any of the defendants' officers or incorporators had knowledge of the negligent construction which caused the break, or any reason to suppose that such break existed or that gas was escaping, until March 2^d," and that "unless chargeable with the original defective construction, or bound in commencing the operation of the works to know that the pipes were whole or properly laid, the defendants were guilty of no negligence until after notice." these findings must be regarded as settling their liability in respect of care up to that time, and the plaintiff's recovery

must be restricted accordingly to the damage subsequently accruing.

The special damages claimed and allowed for the injury to the plaintiff's business reputation, on account of his sales of damaged plants, were not properly recoverable and must be disallowed as too remote.

There are cases, undoubtedly, where the tort complained of is of such a nature that the law will not nicely attempt to limit the amount of reparation, but will extend the line of relief so as to embrace all the consequences of the wrongdoer's conduct, although quite remote from the original transaction; but, as a general rule, it may be said that in cases of tort without special aggravation, where the conduct of the defendant cannot be ³¹⁶ considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of the plaintiff's remuneration is restricted to such damages as are the legal and natural consequences of the defendant's wrongful act: 1 Sedgwick on Damages, 7th ed., 144, and authorities cited. This rule has been recognized in a multitude of cases; and when applied to the present case, it renders the injury to the plaintiff's reputation far too remote for legitimate compensation. The full damage to the plaintiff's plants was a proper matter for inquiry, but the consequence to his reputation resulting from a sale of the plants to his customers, "reasonably supposing them sound," was obviously beyond the range of such inquiry, and conjectural merely. It was altogether too shadowy and indirect for legal consideration, and must be regarded as an unexpected, unnatural, and accidental consequence of the defendants' wrong.

The result is, that the plaintiff is entitled to recover the damage to his plants after notice to the defendants of the escaping gas and subsequent to the time when by the exercise of due care they could have discovered and repaired the defective pipe, and also the value of the extra coal burned by him as found by the trial justice, amounting together to the sum of two hundred and sixty-three dollars.

Judgment accordingly.

Parsons, J., did not sit; the others concurred.

PROOF OF NOTICE OF DEFECTIVE PREMISES is not necessary to fix the liability of one whose duty it is to know their condition for injuries arising therefrom: *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 663. See, too, the note to *Chalkley v. Richmond*, 29 Am. St. Rep. 741.

NEGLIGENCE ESCAPE OF GAS.—If plants in a plaintiff's greenhouse are injured by the escape of gas from the defendant's mains laid through a city sewer, owing to the city's negligence in constructing the sewer, the defendant is liable: *Butcher v. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626. On the liability of gas companies in general, see the extended notes to *Shepard v. Milwaukee Gas Light Co.*, 70 Am. Dec. 485-489; *Mississinewa Min. Co. v. Patton*, 28 Am. St. Rep. 205, 206.

DAMAGES FOR REMOTE AND SPECULATIVE LOSS of profits cannot be allowed: *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 813. See, too, the note to *Moulthrop v. Hyett*, 53 Am. St. Rep. 143.

RICHARDSON v. BAILEY.

[69 NEW HAMPSHIRE, 384.]

ATTACHMENT—TITLE.—The rights of parties in property attached must be determined by the state of the title at the time the attachment is made, and they are not affected by the fact that the defendant may have subsequently acquired title.

ATTACHMENT—RIGHTS OF OFFICER.—After all liability of an attaching officer to the parties has ended, he cannot maintain an action against the receptor upon a receipt for the property attached.

Osgood & Osgood and D. A. Taggart, for the plaintiff.

G. W. Prescott and J. B. Cavanaugh, for the defendant.

384 PEASLEE, J. The rights of the parties in the property attached are to be determined by the state of the title at the time the attachment was made: *Drake on Attachment*, sec. 245. They are not affected by the fact that the defendant may have subsequently acquired title: *Crocker v. Pierce*, 31 Me. 177. It is suggested that, as the property was in the custody of the receptor and the officer intended to hold it under the attachment against Peltiah, it may be treated as attached as of the date when the executor's bond was filed. However this might be, if the officer then had power to make an attachment, the rule could not apply when the title was acquired after the officer's right to act had terminated. The bond was filed Tuesday, April 21, 1896. The last day of service for the May term, 1896, was Monday, April 20 (*Pub. Stats.*, c. 219, sec. 1; *Laws 1893*, c. 9), and so this contention cannot avail the plaintiff.

The title to the personal estate vested in the person named

as executor in the will, as trustee, even before the will was probated: *Shirley v. Healds*, 34 N. H. 407, 411. By the filing of ³⁸⁵ the bond to pay debts and legacies, the title passed to him as an individual: *Batchelder v. Russell*, 10 N. H. 39; *Tappan v. Tappan*, 30 N. H. 50, 68; *Mercer v. Pike*, 58 N. H. 286.

Peltiah made the demand, and the property was delivered to him as executor. But, if he should now attempt, as an individual, to recover its value from the officer upon the ground that the property should not have been delivered to the executor, the title being in the individual, the fact that he represented that the title was in the executor would operate as an estoppel. For this reason the officer is not liable to the owner; and as the debtor had no attachable interest in the property, the officer is not accountable to the creditor. All liability of the officer being thus at an end, he cannot maintain this action against the receiptor: *Whittredge v. Maxam*, 68 N. H. 323; *Scott v. Whittemore*, 27 N. H. 309, 321.

What the effect of the settlement of the estate in the insolvent course might be upon the liability of the receiptor is a question not considered: See *Moody v. Davis*, 67 N. H. 300.

In accordance with the terms of the agreed case, the plaintiff may have a trial upon the question of Peltiah's title to the horses apart from that derived under the will.

Case discharged.

All concurred.

AN ATTACHING CREDITOR CAN ACQUIRE NO BETTER RIGHTS than the debtor had at the time of the attachment. If thereafter the latter acquires other interests in the property, they are unaffected by the attachment: See the monographic note to *Franklin Bank v. Bachelder*, 39 Am. Dec. 608.

CORNING v. RECORDS.

[69 NEW HAMPSHIRE, 390.]

SALES—DELIVERY OF POSSESSION.—A sale of personalty in the custody of a lessee is valid as against creditors of the vendor without actual change of possession, and is not rendered void by the failure of the vendee to notify the lessee of the sale during the term of the lease.

ATTACHMENT—TRUSTEE PROCESS—LIENS.—Plaintiff in trustee process does not acquire a lien upon specific chattels in the hands of the trustee by service upon him, nor does such service enable him to avoid a conveyance of the property by the debtor on the ground that it is fraudulent in law because intended as security, though absolute in terms.

Foreign attachment. Prior to June 12, 1896, the property in dispute was owned by one Geiger, and by him leased to Cruft for one year, the lease ending October 1, 1896. Prior to June 12, 1896, Geiger sold the property to Records. Cruft was notified of the sale, held the property as Records', and the only possession the latter had was that of Cruft as lessee for him. On June 12, 1896, Records, in consideration of five thousand five hundred dollars received, executed a bill of sale of the property to one Clark, and at the same time and as part of the same transaction, Records gave Clark his note for said sum payable in two months, and Clark gave Records an agreement to reconvey to him upon the payment of his note. The transaction was intended to be and in fact was a mortgage to secure the sum mentioned. Clark claimed to hold the property as security for his note and interest. The plaintiffs denied Clark's title, and ask to have the trustee charged for all the property.

Bingham, Mitchell & Batchellor, and G. W. Anderson, for the plaintiffs.

Smith & Sloan, for the claimant.

391 PARSONS, J. The only issue is between the plaintiffs and the claimant. The question is whether the plaintiffs can take the property without first satisfying Clark's claim for money loaned Records in reliance upon the property as security. The transfer to Clark was in good faith, with no intent to defraud creditor, and as between the parties is conceded to be valid.

The first ground upon which the plaintiffs claim Clark's title is invalid as to them is that the conveyance from Records to him was a chattel mortgage (Jones on Chattel Mortgages, sec. 19; Potter v. Locomotive Works, 12 Gray, 154; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113), invalid because neither sworn to nor recorded: Pub. Stats., c. 140, secs. 2, 6, 10, 12. Conceding for the purpose of discussion that the conveyance was in mortgage, the only question is of delivery or change of possession; for if there was a sufficient delivery to Clark, his title is good against everyone, if he holds by way of mortgage: Clark v. Tarbell, 57 N. H. 328; Smith v. Moore, 11 N. H. 55; Morse v. Powers, 17 N. H. 286; Pub. Stats., c. 140, secs. 2, 12. At common law, a mortgage of personal property was valid without change of possession: Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25; Ash v. Savage, 5 N. H. 545; Hoit v. Remick, 11 N. H. 285; Barker v. Hall, 13 N. H. 298. Since the statute, delivery of possession is essential to the validity of such a mortgage ³⁹² unless the substitute prescribed by the statute, oath and record, is strictly complied with.

No different delivery is required in the case of a mortgage than of an absolute sale. A delivery sufficient to pass the title as against third persons in the one case will in the other: Smith v. Moore, 11 N. H. 55, 65. "The general rule is that delivery of possession is necessary in a conveyance of personal chattels as against everyone except the vendor. . . . An actual delivery by the vendor . . . is not in all cases necessary. It is enough if the delivery be such as the situation of the property admits. . . . And when the goods are so situated as to admit of no delivery, the sale will be valid without any delivery. . . . All cases of sales of chattels which are so situated that there can be no delivery at the time of the sale are within the exception to the general rule, whether the chattels be upon the land or upon the water. Negligence on the part of the vendee to take possession may invalidate his claim, as against creditors or subsequent purchasers without notice; but, if there be no laches on the part of the vendee, if he take possession in a reasonable time, his title can in no case be impeached for want of possession": Ricker v. Cross, 5 N. H. 570-572, 22 Am. Dec. 480.

Among the illustrations given by Richardson, C. J., are the sale of a ship and goods at sea. In Conard v. Atlantic Ins. Co., 1 Pet. 386, 449, it is said: "In case of even an absolute

sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. The same rule applies in case of a ship in a distant port, and of a sale of goods already in the hands of the purchaser where a change of possession is impossible": *Manton v. Moore*, 7 Term Rep. 67. *Ricker v. Cross*, 5 N. H. 570, 22 Am. Dec. 480, was approved in *Patrick v. Meserve*, 18 N. H. 300, where the title was held to pass without delivery when the chattels were at a considerable distance from the parties; and in *First Nat. Bank of Peoria v. Northern R. R. Co.*, 58 N. H. 203, 204, which was trover by the holder of a bill of lading, who had made advances on the goods, against a common carrier who had delivered the goods to a third party. It is said in the opinion: "The delivery of the bill of lading takes the place of delivery of the goods, for no delivery of the latter is practicable at the time, and the symbolical delivery of the bill is sufficient to pass the title." While the latter case may, perhaps, stand upon a rule peculiar to bills of lading, it is the impracticability of actual delivery which is the foundation of that rule. The rule requiring actual delivery and change of possession in the sale of chattels applies only when the chattels are in possession and an actual change can be had. Hence, "where the goods sold are in the custody of another, and an order is given to the depositary to deliver them to the buyer, which is ³⁹³ presented to him, there the sale is complete": *Pinkerton v. Manchester etc. R. R. Co.*, 42 N. H. 424, 452; *Stowe v. Taft*, 58 N. H. 445; *Tuxworth v. Moore*, 9 Pick. 347, 348, 20 Am. Dec. 479; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454, 459; *Pratt v. Parkman*, 24 Pick. 42.

In the present case, the property is described in the agreement given Records by Clark as "all the personal property in and about Maplewood Hotel premises at Bethlehem, New Hampshire," a description in substance that given us by the referee. It was located at Bethlehem, the parties were at the time in Boston, and, if nothing else appeared, the property might well be held to have passed without manual tradition on account of its character and situation relative to the parties, subject to impairment of Clark's title in its validity as to third persons by his negligence in obtaining actual possession; but a more satisfactory reason why actual manual possession was not given, and a more substantial ground for the conclusion that the title passed without manual tradition of the property, rests

in the fact that both were impossible. The property was in the possession of Cruft, under a lease for a definite term from Geiger, from whom Records received such title as he had. The lease is not before us, but we infer from the term used that it was a bailment for hire. Under such a contract Cruft had both the possession and the right to the possession. Records had neither, and never had. The law did not require him to commit a trespass, or a breach of the covenants of the lease, to enable him to transfer to Clark what Geiger had sold to him.

The property during the lease was not subject to levy on attachment or execution against Geiger, Records, Clark, or whoever was the general owner; it could be attached as against them, if at all, only by trustee process (*Hartford v. Jackson*, 11 N. H. 145; *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782; *Drake on Attachment*, secs. 245, 246), while Cruft's interest was subject to attachment and levy: *Wheeler v. Train*, 3 Pick. 255.

As the property could not be levied upon during the term, Cruft could not be charged as trustee as long as he held under the lease: *Pub. Stats.*, c. 245, sec. 33. As Cruft, as bailee, had the exclusive right to the possession, not only against third persons but against the general owner as well (*Story on Bailments*, sec. 395), it was not only impracticable, but impossible, for Records lawfully to have actual possession or to deliver it to Clark. The law does not require what is impossible. Records' right was merely to receive the property at the termination of the lease: and to a valid transfer of that right, a manual tradition of the property he had the future right to receive was no more essential than a transfer of a future right to receive the same value in money would require an actual delivery of cash. The right he received from Geiger and transferred to Clark resembled, if it was not in ³⁹⁴ effect, a mere chose in action. The transaction was, in substance, in both cases an assignment of a right rather than a sale of chattels.

It is held in the cases cited above, and is a general rule, that where personal chattels are in the custody of a third person and he is notified of the sale, no change of possession is required: *Morse v. Powers*, 17 N. H. 286; *Brown v. Warren*, 43 N. H. 430; *Stowe v. Taft*, 58 N. H. 445. In the present case, the mortgagee, Clark, could neither take nor lawfully demand the actual possession. If he gave notice of his claim to Cruft,

such notice could be in legal effect only that at the expiration of the term he would demand possession. From the situation of the property and the parties, the title passed to Clark without any delivery, and the sole remaining question is whether Clark's failure to notify Cruft until August 19th was such negligence in obtaining possession of the chattels conveyed to him as to invalidate his title as against third persons. If he was obliged to give such notice, there must be some sound reason for it. Since the earliest date upon which Clark could get possession was October 1st, he cannot be guilty of negligence in not obtaining possession before he lawfully could, or for not making a useless demand for possession to which he was not entitled. It has not been expressly decided in this state that a mere custodian, even, could be charged for goods in his hands as against a bona fide claimant, on the ground that notice did not reach the trustee until after the trustee process was served. But the assent of the depositary can no more affect the passing of the title and can be no more necessary than the assent of a debtor to the assignment of a debt (*Conway v. Cutting*, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 409; *Pollard v. Pollard*, 68 N. H. 356; *Marsh v. Garney*, 69 N. H. 236), in which case the assignment protects the assignee's rights if the debtor has notice in season to take advantage of it before judgment against him, although he has no knowledge of it at the time he is summoned: *Pollard v. Pollard*, 68 N. H. 356; *Dix v. Cobb*, 4 Mass. 508; *Kingman v. Perkins*, 105 Mass. 111; *Drake on Attachment*, sec. 608.

There would seem to be no occasion for a different rule where the subject of the deposit is personal chattels rather than money. As the assent of the custodian cannot be essential to pass the title, notice to him where the purchaser has exercised diligence to secure possession of the goods can only be necessary upon the ground that one cannot be made custodian for another without his consent, express or implied, and hence in order that the possession of the custodian should inure to the purchaser, it must appear expressly or by implication that he had agreed or assented to hold for him. This is the argument in *Hollarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433. This view, however, is not generally adopted and has been extensively criticised, while *Lanfear v. Sumner*, 17 Mass. 395 110, 9 Am. Dec. 119, upon which the decision is based, is distinctly disapproved by *Richardson, C. J.*, in *Ricker v. Cross*, 5 N. H. 570, 573, 22 Am. Dec. 480. But whether the argument

is sound or not, it has no application in this case, for Cruft was not a mere depositary, but held under a lease for a definite term. Unless by the terms of the lease to Cruft a transfer of the general ownership terminated the lease, there is no reason why notice to him should be essential to pass the title. If upon such notice he was not discharged from his lease, he could not dissent and refuse to hold the property. If he could not dissent, his assent could not confer any right. If he could not dissent, his continuing to hold the property would not be an assent and agreement to hold the property for Clark. If neither his assent nor his dissent, or his refusal to do either, affected the title, no legal reason exists why he should have an opportunity for a choice which he could not be compelled to exercise and which was immaterial if made. His holding was under his lease, and no legal reason can be given for an arbitrary power of assent or dissent vested in him as a restraint upon the power of alienation in the general owner. Hence, Clark's title is equally valid whether Cruft dissented or assented, whether Cruft had or had not notice. The reason assigned in all the cases declaring the unexplained possession by the vendor after an absolute sale conclusive evidence of fraud, is that the vendor is given an opportunity to treat the property as his own and thereby gain a false credit: *Trask v. Bowers*, 4 N. H. 309; *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466; *Page v. Carpenter*, 10 N. H. 77; *Morse v. Powers*, 17 N. H. 286; *Mandigo v. Healey*, 69 N. H. 94. It is the open possession by the vendor as owner that works the fraud. In this case Records never had any possession. There was nothing about the continued possession of Cruft that tended to give Records any false credit. If it should be suggested that upon inquiry of Cruft his statement as to the general ownership would have that effect, there is no more foundation for such claim than there would have been had he owed him a debt on account of a promissory note. Neither would Cruft have been under any obligation to furnish information if he had it. Delay in notifying Cruft may or may not under all the circumstances have weight on the question of fraud in fact, and undoubtedly was duly considered by the referee; but of itself it cannot, under the circumstances, amount to fraud as matter of law.

But whatever view as between the parties in equity, for the protection of Records' equitable interest in the property, should be taken of the transaction between Records and Clark,

it is clear that the conveyance from Records to Clark was not a mortgage within the contemplation of the statute. It contained no condition and therefore could not be verified by affidavit. The law contains no provision for the record of such an instrument. Its record would have added nothing to its validity.

~~200~~ The conveyance was absolute in terms, but intended as security. There was an express secret trust. Such a conveyance of either real or personal property is fraudulent in law, though no fraud in fact is intended, and is void against creditors of the grantor who seize the property by attachment or levy: *Watkins v. Arms*, 64 N. H. 99; *Stratton v. Putney*, 63 N. H. 577; *Coolidge v. Melvin*, 42 N. H. 510, 522. But such a conveyance has heretofore been understood to be valid as between the parties, and as against all creditors of the vendor except those who by attachment or levy seize the identical property: *Jones v. Bryant*, 13 N. H. 53; *Hill v. Pine River Bank*, 45 N. H. 300, 309; *Ritchie v. Glover*, 56 N. H. 510; and as against trustee process: *Boardman v. Cushing*, 12 N. H. 105; and as against the grantor's assignee in insolvency: *Thompson v. Esty*, 69 N. H. 55.

The plaintiffs, however, contend that the service of the writ upon Cruft created a lien in their favor upon the specific chattels in his possession, by force of which they acquired the same rights as against Clark's title as if the chattels claimed had been actually seized by the sheriff.

That trustee process is an equitable proceeding in which the rights of the parties are determined upon equitable principles, and that, in the absence of fraud in the intent, the trustee cannot be charged for chattels in his possession unless he has in his hands property belonging to the defendant which the defendant has the legal right to take and carry away, are propositions for which in this state the citation of authority seems superfluous: *Pollard v. Pollard*, 68 N. H. 356; *Tucker v. Chick*, 67 N. H. 77; *National Revere Bank v. Shoe Fastening Co.*, 67 N. H. 371; *Carter v. Webster*, 65 N. H. 17; *Proctor v. Lane*, 62 N. H. 457, 463; *Robinson v. Mitchell*, 62 N. H. 529; *Forist v. Bellows*, 59 N. H. 229; *Landry v. Chayret*, 58 N. H. 89; *Banfield v. Wiggins*, 58 N. H. 155; *Gutterson v. Morse*, 58 N. H. 529; *Conway v. Cutting*, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 409; *Richards v. Connecticut River R. R.*, 44 N. H. 127, 129; *Pittsfield Bank v. Clough*, 43 N. H. 178, 187; *Brown v. Warren*, 43 N. H. 430; *Rand v. White Mountain R. R.*,

40 N. H. 79, 87; Getchell v. Chase, 37 N. H. 106, 110; Swamscot Machine Co. v. Partridge, 25 N. H. 369, 373, 374; Boardman v. Cushing, 12 N. H. 105; Paul v. Paul, 10 N. H. 117, 120; Greenleaf v. Perrin, 8 N. H. 273; Hutchins v. Sprague, 4 N. H. 469, 17 Am. Dec. 439.

That upon equitable principles the trustee could not be deprived of his right to hold the property in his hands as security because the conveyance to him was absolute in form, though intended as security, is expressly decided in Boardman v. Cushing, 12 N. H. 105, 114, where it is said by Parker, C. J., "it would not consist with equity to deprive the party of a mortgage security, by reason of a mere mistake in the mode of taking it."

397 The claimant is properly made a party to the action: Pub. Stats., c. 245, sec. 25. Where it appears a third party claims the property, the validity of his claim will not be passed upon unless he is made a party: Dyer v. Webster, 18 N. H. 417. He is made a party for the protection of his equitable as well as his legal right: Pollard v. Pollard, 68 N. H. 356; Garland v. Harrington, 51 N. H. 409; Conway v. Cutting, 51 N. H. 407. The admission of the claimant as a party to the suit does not alter the issue. The sole question is whether the trustee shall be charged or discharged. If the claimant, having obtained leave, does not appear, nevertheless the trustee is discharged if it appears on the evidence that the property in his hands is the property of the claimant and not of the principal defendant: Cram v. Shackleton, 64 N. H. 44. If the property is not the defendant's, the trustee is discharged without consideration of the claimant's title: Rice v. Lyndeborough Glass Co., 60 N. H. 195. The sole question is whether the property is the property of the defendant; and in the absence of fraud in intent, or statutory requirements, as in the case of assignments of wages to be earned in advance (Pub. Stats., c. 215, sec. 4), or when the claimant's or trustee's title is purely legal and not equitable, and technically defective, as in cases of assignments in insolvency under the statutes of another state or in contravention of the law of this state (Saunders v. Williams, 5 N. H. 213; Hurd v. Silsby, 10 N. H. 108, 34 Am. Dec. 142; Derry Bank v. Davis, 44 N. H. 548), the plaintiff can charge the trustee only on the strength of the defendant's title; for the object of the proceeding "is to reach the property of the debtor in the hands of third persons. In applying this remedy, the facts must first be ascertained, and

the ownership of the property determined. But it can never be appropriated to pay the debt of the plaintiff until it is shown to belong to the defendant": *Kaley v. Abbot*, 14 N. H. 359, 362; *Brown v. Silsby*, 10 N. H. 521; *Leland v. Sabin*, 27 N. H. 74; *Rice v. Lyndeborough Glass Co.*, 60 N. H. 195. The subject for inquiry in all the cases is, to whom did the property actually belong, regardless of the question whether at the time of service the trustee had notice of the adverse claim.

In *Giddings v. Coleman*, 12 N. H. 153, the precise question in this case was raised. The claimant based his title upon an assignment absolute in form, but intended as security. This case was decided at the same term with *Boardman v. Cushing*, 12 N. H. 105, and though decided against the claimant on the ground that the existence of the assignment was not sufficiently proved, the court say further: "The question raised at the argument by the counsel for the plaintiff as to the validity of the assignment, upon the ground of alleged legal fraud, becomes immaterial upon the view taken of the other questions raised upon the case. And if it were otherwise, it could not prevail, for the reasons contained ³⁹⁸ in the opinion of the court, delivered by the chief justice, in the case of *Boardman v. Cushing*, 12 N. H. 105, at this term."

Boardman v. Cushing, 12 N. H. 105, decided in 1841, has been repeatedly cited and approved, and was discussed and relied upon in *Thompson v. Esty*, 69 N. H. 55, 70: See, also, *Stedman v. Vickery*, 42 Me. 132, 134. The plaintiffs' proposition calls upon us, not only to overrule *Boardman v. Cushing*, 12 N. H. 105, and *Giddings v. Coleman*, 12 N. H. 153, which are precisely in point, but the whole current of authority in this state establishing the principles of equitable procedure in trustee process.

But we are not called upon to weigh the soundness of this claim against the long line of well-considered cases which have been cited, for the premise upon which it is founded is fatally defective. A plaintiff in trustee process does not acquire a lien upon the specific property in the hands of the trustee by service upon him. The substantial difference between attachment by direct seizure and by trustee process is that the validity of the attachment in the latter case does not depend upon the officer's taking or retaining possession of the property, and creates no specific lien upon the defendant's property in favor of the plaintiff. In place of such lien, the plaintiff acquires a right to hold the trustee personally responsible for the value

of the goods for which he may be charged: Drake on Attachment, sec. 453; 2 Wood on Attachment, sec. 325; 2 Shinn on Attachment, sec. 467; Bufford v. Sides, 42 N. H. 495, 504; Wolcott v. Keith, 22 N. H. 196, 205. Such appears to be the general rule: Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501; Bigelow v. Andress, 31 Ill. 322; Gregg v. Savage, 51 Ill. App. 281; McConnell v. Denham, 72 Iowa, 494; Mooar v. Walker, 46 Iowa, 164; McGarry v. Lewis Coal Co., 93 Mo. 237, 3 Am. St. Rep. 522; Maish v. Bird, 48 Fed. Rep. 607; and if it were not so upon authority, a sufficient answer would be that no such lien is given by statute, for the remedy of the plaintiff, if the trustee neglects or refuses to deliver the goods for which he is adjudged chargeable, is not in following the goods but in a personal judgment against the trustee: Pub. Stats., c. 245, secs. 33, 34; Aldrich v. Woodcock, 10 N. H. 99, 103; Despatch Line v. Bellamy Co., 12 N. H. 205, 238, 37 Am. Dec. 203.

What the rule is in Massachusetts under the language of the statute of the state (Mass. Pub. Stats., c. 183, sec. 21) is unnecessary to consider: Parker v. Kinsman, 8 Mass. 486; Burlingame v. Bell, 16 Mass. 318; Swett v. Brown, 5 Pick. 178; Platt v. Brown, 16 Pick. 553; Rockwood v. Varnum, 17 Pick. 289, 293.

That the service of the writ upon the trustee constitutes an attachment of the defendant's property rights in the trustee's hands is beyond question: Broadhurst v. Morgan, 66 N. H. 480; Nelson v. Sanborn, 64 N. H. 310; Pratt v. Sanborn, 63 N. H. 115; Page v. Thompson, 43 N. H. 373, 376; Young v. Ross, 31 N. H. 201, 205; King v. Holmes, 27 N. H. 266; Blaisdell v. Ladd, 14 ³⁹⁹ N. H. 129; but it has never been suggested that any special property, such as is acquired by the officer in goods seized, accrued to the officer or the creditor in the specific chattels in the trustee's possession, while it is clear a right or lien is created in the trustee to hold them, if he elects so to do, to answer to the process. The statement of Richardson, C. J., in Burnham v. Folsom, 5 N. H. 566, that "the service of the process of foreign attachment upon the trustee creates a lien in favor of the plaintiff, upon the debt or property in the hands of the trustee," is not an authority for the plaintiffs' claim to a lien giving them a special property in specific chattels, for the lien Judge Richardson had in mind was one which would attach as well to a debt as to chattels.

Upon grounds already suggested, there was a sufficient delivery from Records to Clark. If there were not, the want of change of possession would only imply a secret trust where one is expressly found. If Clark's title is not invalidated by the one, it is not by the other: See *Robinson v. Mitchell*, 62 N. H. 529. Clark has an equitable interest in the property claimed to be held by the trustee process to the extent of his five thousand five hundred dollar note and interest. Whether Records' equitable title to the property—his right of redemption upon payment of the amount for which the property is held by Clark—is attachable on trustee process is a question not raised. However that may be, upon payment or tender to Clark by the plaintiffs of the amount of his claim, which has already been adjudicated, the property will stand in Cruft's hands released therefrom; and the lease having terminated, Cruft may then be charged therefor. At the trial term such orders will be made as may be necessary to protect the rights of the parties: Pub. Stats., c. 245, secs. 32, 34; *Isabelle v. Le Blanc*, 68 N. H. 409.

Case discharged.

All concurred.

SALES—CHANGE OF POSSESSION.—A sale of personal property in the hands of a bailee, without change of possession, is valid against an execution creditor, where the vendor does not again take it into possession: *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501. So there is a sufficient delivery where the property sold is in the possession of a third person and the vendor directs him to deliver it to the vendee: See the extended note to *Claffin v. Rosenberg*, 97 Am. Dec. 348, on change of possession sufficient as against creditors and subsequent purchasers.

SERVICE OF PROCESS OF GARNISHMENT does not create a specific lien in favor of the plaintiff upon the property of the defendant in the hands of the garnishee: *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 3 Am. St. Rep. 522. Compare *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, 8 Am. St. Rep. 224.

DOW v. ELECTRIC COMPANY.

[69 NEW HAMPSHIRE, 498.]

WATERS AND WATERCOURSES.—HIGH-WATER MARK on fresh-water rivers is not the highest point to which the stream rises in times of freshet, but is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

Petition under a flowage statute for the assessment of damages. Verdict for plaintiff, and defendant excepted.

Burnham, Brown & Warren, for the plaintiffs.

Sulloway & Topliff and D. A. Taggart, for the defendants.

498 WALLACE, J. The high-water mark on fresh-water rivers is not the highest point to which the stream rises in times of freshets, but is "the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture": Gould on Waters, sec. 45; Howard v. Ingersoll, 13 How. 381; In re Minnetonka Lake Improvement, 56 Minn. 513, 45 Am. St. Rep. 494; Houghton v. C. D. & M. R. Co., 47 Iowa, 370. The instructions to the jury were in accordance with this principle.

Exception overruled.

Pike, J., did not sit; the others concurred.

HIGH-WATER MARK on fresh-water rivers and lakes is where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as the nature of the soil itself: In re Minnetonka Lake Improvement, 56 Minn. 513, 45 Am. St. Rep. 494.

FRIEL v. PLUMER.

[69 NEW HAMPSHIRE, 498.]

ATTACHMENT.—DAMAGES FOR MENTAL SUFFERING caused by a malicious attachment of exempt property may be recovered.

APPEAL—AN ORDER LIMITING COSTS is not subject to exception.

J. Gage and W. H. Drury, for the plaintiff.

Andrews & Andrews, for the defendants.

499 PARSONS, J. The ground of the plaintiff's claim at the present time is not the malicious prosecution of a civil suit against her. It is conceded that no such cause of action arises upon the facts, because the defendants' suit against the plaintiff had not been terminated when the present suit was commenced, and the recovery by the present defendants in the former suit establishes that that suit was not brought without probable cause: *Davis v. Clough*, 8 N. H. 157; *Cooley on Torts*, 181, 185; 2 *Greenleaf on Evidence*, secs. 452, 453. "For maliciously prosecuting a good cause of action in the manner provided by law, for the purpose of recovering damages therein, there is no remedy because there is no wrong": *Johnson v. Reed*, 136 Mass. 421, 422; *O'Brien v. Barry*, 106 Mass. 300, 8 Am. Rep. 329. But the illegal attachment and seizure of all the plaintiff's household property, exempt by statute from attachment and seizure, was not a prosecution of the defendants' cause of action in the manner provided by law, and the plaintiff now rests her case on the alleged malicious abuse of process—on the trespass, for which the legal process affords no justification. A few days after the attachment, upon demand, all of the property attached was released to her except three articles valued at sixteen dollars, for which ⁵⁰⁰ sum it is conceded the plaintiff is entitled to judgment. The plaintiff was greatly distressed mentally, and physically prostrated by the prolonging of the suit and the attaching and removing of her furniture. If the plaintiff is entitled to recover "mental damages or exemplary damages" on the facts found, such damages are assessed at fifty dollars. The controversy is whether this sum can be recovered.

"In a civil action founded on a tort, nothing but compensatory damages can be awarded, but the injured party is entitled to full compensation for all the injury sustained, mental as well as material. In some cases, compensation for the actual damage sustained will be full compensation. In other cases, the material damages may be trivial, and the principal injury be to the wounded feelings from the insult, degradation, and other aggravating circumstances attending the act": *Kimball v. Holmes*, 60 N. H. 163, 164. The case cited was trespass for beating and injuring the plaintiff's mare with an ax. A referee reported that the defendant committed the injury as alleged, and accompanied the act by such malicious insults as would enhance the damages. The court construed the award to mean compensation to the plaintiff for the material injury to his property, and for his mental damage by reason of the defendant's malice. In that case, injury to the plaintiff's horse inflicting a partial loss of its value upon the plaintiff did not give him a greater right to damages than he would have had if deprived of its whole value because it was killed or driven away by the defendant. The plaintiff's material loss in such case would have been the value of his horse, and his right to full compensation would not have been affected under the same circumstances by the increase in the material damage; neither would the plaintiff's right to compensation be affected by the fact that the personal property injured was capable of being driven instead of carried away from his control—was animate instead of inanimate. The material damage would merely be greater or less according to the value of the property lost. The amount or character of the plaintiff's material damage for which he might recover, regardless of the defendant's malice or want of malice, does not affect his right to recover for mental distress occasioned by the defendant's malice. In the present case, the plaintiff's inanimate property was wrongfully taken from her by the defendants. If the taking was without malice, the value of the property lost—the material injury—is full compensation for the injury. If the defendants acted maliciously, and the plaintiff suffered mental damage thereby, she does not receive full compensation for the wrong done unless she recovers the award for such damage. As said in *Kimball v. Holmes*, 60 N. H. 163, 164, the cases of *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, and *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475, may be regarded as settling ⁵⁰¹ the law in this state. Whether the attachment of the plaintiff's

household furniture was or was not malicious is a question of fact. The referee finds that Plumer in bringing the suit was moved quite as much by his anger and spite toward her as by his desire to collect the firm debt, but makes no finding as to the attachment. If such attachment was made for either of these purposes, with knowledge that the property was exempt from attachment, or without reasonable ground to suppose that it was subject to attachment, that fact with the other facts reported furnishes evidence from which the inference of malice might and perhaps should be found; but whether the attachment was actually malicious—made to harass or annoy the plaintiff, or illegally to compel payment by her—is a question of fact. It appears that the plaintiff expressly requested the referee to find upon the question of malice. No finding upon this question as to the attachment has been made, and, as the fact is material, judgment cannot properly be ordered until the fact is found: Pub. Stats., c. 247, sec. 11. At the trial term the report may be recommitted for a specific finding upon this question, when the plaintiff will be entitled to judgment accordingly as the fact is found. The order limiting costs is not open to exception: *Nutter v. Varney*, 64 N. H. 334.

Exception sustained.

Peaslee, J., did not sit; the others concurred.

ATTACHMENT.—MENTAL SUFFERING is an element too remote and speculative to be considered in assessing damages for a wrongful attachment: See the extended note to *Tisdale v. Major*, 68 Am. St. Rep. 272.

CRIPPEN v. LAUGHTON.

[69 NEW HAMPSHIRE, 540.]

ACTIONS—CAUSE CREATED BY STATUTE—COMITY.—A cause of action unknown to the common law, and existing only by reason of the local statute of a state, cannot be enforced in another state in contravention of its laws.

CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDER—LOCAL ACTION TO ENFORCE.—A statute enabling a judgment creditor of a corporation to recover of each stockholder therein an amount equal to the par value of his stock imposes a statutory and not a contractual liability, and the cause of action arising under such statute is purely local, and not transitory.

J. W. Remick and S. W. Emery, for the plaintiffs.

Frink & Marvin, for the defendant.

546 **BLODGETT, C. J.** The question submitted is whether the plaintiffs' bill (or action at law, if they are permitted to amend) can **547** be maintained; or, in other words, whether a cause of action unknown to the common law, and which exists only by reason of a local law of the state of Kansas, can, or ought to be, enforced in this jurisdiction.

The several states of the Union do not stand in their relations to each other altogether like foreign countries. They are all subject in many respects to a superior sovereignty, and to numerous laws common to all of them. They are in various ways mutually dependent upon each other. To a large extent their interests are common. Their personal and commercial intercourse is constant and without restriction. Their political and business relations are equally intimate. Many of their relative rights and duties are declared by a "carefully prepared instrument" which controls them all. They are not several or foreign, but united, states.

Nevertheless, each state is a sovereign state, except only as it is subject to the federal constitution, under which, for all purposes embraced in it, "the states and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other, their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions" (*Bank of Augusta v. Earle*, 13 Pet. 519), "and their acts have, consequently, no extraterritorial authority": *Sedgwick on Statutory and Constitutional Law*, 60; *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106.

Such being the relation and position of the states in regard to each other, a uniformity of state laws is universally recognized as desirable, but has hitherto been found impracticable. There is no reasonable probability of such uniformity in the immediate future through the action of the states. It is in fact apparent that, by reason of their location, the peculiarities of their soil and climate, the character of their people, their business and commercial interests, and a multitude of other conditions and circumstances, a law beneficial in one state might be injurious in another. To make a law of Massachu-

setts equally valid and enforceable in Oregon might, and probably would, do injustice to the citizens of both states, or to make the laws of both identical.

The federal constitution declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof": U. S. Const., art. 4, sec. 1. Under this provision, the Congress has enacted that "the acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, ⁵⁴⁸ shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state . . . shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, . . . together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken": U. S. Rev. Stats., sec. 905.

By this statute the mode of authentication of both state statutes and of the judgments of state courts, and the effect of such judgments in other states, are determined: *Mills v. Duryee*, 7 Cranch, 481; *Booth v. Clark*, 17 How. 322. But nothing is said as to the effect of a state's "public acts"; nor, so far as we have been able to ascertain, is there a word to be found touching their meaning, or relating to the power of Congress to prescribe their effect, in any judgment of the United States supreme court. Presumably, however, the words "public acts" mean "public statutes"; and the inference is strengthened by the first clause of the statute above cited.

Does the second clause of the first section of article 4 confer upon Congress the power to prescribe the "effect" the statutes of one state shall have in another? Story says: "Some learned judges have thought that the word 'thereof' had reference to the proof or authentication, so as to read, 'and to prescribe the effect of such proof or authentication'; but that the sounder interpretation is, that it refers to the antecedent words, 'acts, records, and proceedings,' so as to read, 'and to

prescribe the effect of such acts, records, and proceedings’ ”: 3 Story on the Constitution, secs. 1306, 1307.

That this is the correct view in respect to judgments is established: *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, 116 U. S. 277. “But Congress has never acted on the power in the constitution as to the public acts or laws of the states any further than to declare that they shall be authenticated by having the seals of the respective states affixed thereto”: Sedgwick on Statutory and Constitutional Law, 63.

If it is an evil that the laws, or any particular class of laws, of one state cannot be directly enforced in another, the mischief can be easily cured by Congress. It can, for example, provide by general law that the statutes of any state, making stockholders of a corporation in any manner or form liable for the debts of the corporation, shall have the same force and effect in any other state; or, more generally, that every statutory cause of action that may accrue to one person against another in one ⁵⁴⁹ state, including or excluding penal actions, shall be enforceable in every other state; or, any obligation not penal, accruing to one person from another under the law of any state, shall be equally obligatory upon and enforceable against the obligor in any state where he may be found. And, in the absence of such action by Congress, the legislature of this state might provide that all causes of action arising in other jurisdictions should be enforced here by the same method of procedure as there provided—as, e. g., it has done in regard to wills: Pub. Stats., c. 186, sec. 5.

If the remedy would be worse than the disease—if any federal statute on the subject in the power of Congress to enact, or any statute within the authority of our legislature to adopt, would create more evils than it would cure (2 Kent’s Commentaries, 117, 118)—it affords a sufficient, and as we think a decisive, reason against the policy, if not the power, of enforcing such obligations without a statute.

It is universally agreed that the laws of a state have, *ex proprio vigore*, no extraterritorial force—that is to say, no state “can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein”: Story’s Conflict of Laws, secs. 18, 20, 23; 2 Kent’s Commentaries, 457. It is with equal unanimity agreed that “by comity,” as it is termed, foreign laws, so far as they enter into and form a part of contracts or operate upon any common-law cause of action there arising, will be given the same effect they there have in

every jurisdiction where the contract or cause of action is sought to be enforced: 2 Kent's Commentaries, 117, 118. The law "forms . . . a part of the contract, and travels with it wherever the parties to it may be found": *Ogden v. Saunders*, 12 Wheat. 213, 259; *Bliss v. Houghton*, 16 N. H. 90-92; *Watriss v. Pierce*, 32 N. H. 560, 582. So in actions for torts at common law, committed in foreign lands, the statutes of that country are observed only so far as they have there operated upon the cause of action as to modify or destroy it: *Henry v. Sargeant*, 13 N. H. 321; *Steam etc. Co. v. Guillou*, 11 Mees. & W. 877. The plaintiff in such cases seeks to enforce no right or claim arising or accruing to him under any law or statute of the foreign country (*Henry v. Sargeant*, 13 N. H. 332) but his common-law right—a right recognized and enforced in all civilized nations. Neither does the defendant seek to enforce any law of the foreign land except in so far as it has there operated on the cause of action sought to be enforced against him.

In the case of contracts, the common law enforces the contract made by the parties, but not the *lex loci*, except in so far as they have made it a part of the contract. The doctrine that contracts are to be interpreted according to the law of the place where they are made or to be performed is merely a rule for ⁵⁸⁰ finding the intention of the parties: *Peninsular etc. Co. v. Shand*, 3 Moore P. C. C., N. S., 272; *Anstruther v. Adair*, 2 Mylne & K. 513. "A different decision would totally defeat the intention of the contracting parties": *Di Sora v. Phillips*, 10 H. L. Cas. 624, 638, 639. The only purpose of the proof of the foreign law is to determine the meaning of the language used by the parties—for the same reason precisely that evidence is heard of the signification of technical terms: *Prentiss v. Savage*, 13 Mass. 20, 23; *Koster v. Merritt*, 32 Conn. 246; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 118, 6 Am. Rep. 43. The foreign law as such, and *ex proprio vigore*, has no effect. Effect is given to the agreement of the parties only. The court looks into the *lex loci* so far, and only so far, as may be necessary to determine what the contract is, and whether it shall be enforced, if at all, according to the intention of the parties. This is not a matter of courtesy or favor, either to the country where the contract was made or to the parties. It is the right of the parties; it is as if the foreign law were in terms expressed in the contract. The principle "loosely called comity" (*Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 159)

"is not of courts but of nations": Story's *Conflict of Laws*, secs. 37, 38; *Bank of Augusta v. Earle*, 13 Pet. 519, 589.

Can, at common law, an action be maintained in one state to enforce a personal right or liability not recognized or known to that law, but created solely by the statute of another state? It appears to us clear that it cannot without repealing the universally established doctrine that the laws of one state can, *ex proprio vigore*, have no force or effect in another state. Such an action can only be sustained by the direct force of the statute. It must be specially declared upon, or, at all events, the facts must be so alleged that the court, on the face of the declaration, can see that the action is founded on the statute: 1 Chitty on Pleading, 272, 273, and cases cited in note 1; *Smith v. Woodman*, 28 N. H. 520, 528, and cases cited; *Henriker v. Contoocook Valley R. R.*, 29 N. H. 146, 152. The cause of action could arise nowhere except in the state where the statute exists. The action is therefore local. "If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local": Cooley on Torts, 471; Stephen's Commentaries, as cited in Wharton's *Conflict of Laws*, sec. 710. By the common law, an action cannot be sustained upon a local cause of action that has arisen in a foreign country: *Daniel v. Phillips*, 4 Term Rep. 499, 503; *Whitaker v. Forbes*, 1 C. P. Div. 51, 52; *Watts v. Kinney*, 23 Wend. 484; Pollock on Torts, 175, 176; Rorer's *Interstate Law*, 145.

The question of the enforcement of the laws of a foreign state is not a question of comity to that state, but of the power of the courts of the forum. The organic, or statute, or common law of no state in the Union has conferred upon its courts authority ⁵⁵¹ to put into active operative effect, efficient *per se*, the statutes of another state. There is a wide difference between putting a foreign statute in active operation and treating a transaction of which the court has jurisdiction as it is modified, affected, or characterized by the law that operated upon it where it took place. To enforce a liability created solely by the statute of a foreign land is to give that statute precisely the same force and effect as if it were a statute of the forum.

Coming directly to the case in hand, the first inquiry (although not one of controlling importance) suggested by the views we have expressed is, whether the liability sought to be enforced is statutory or contractual.

It must in fairness be conceded that a majority of courts hold such a liability to be contractual; but to this doctrine we cannot assent. True, the defendant, by virtue of his ownership of five shares of the capital stock of the Corn State Bank, became obligated to pay any unsatisfied judgment creditor of the corporation a sum not exceeding the par value of his shares. But how did he become obligated? Not by virtue of any contract—not because he expressly or tacitly agreed to be so obligated—but solely because the law of Kansas imposed the obligation upon him as a secondary and subsidiary liability for the corporation's debts. To adopt the language of another court in a similar case: "Certainly, the ordinary elements of a contract are wanting. The minds of the stockholder and corporation creditor have not met upon the subject matter of the original debt; no credit has been given to the stockholder directly; he has not directly received the consideration, nor has he made a promise, express or implied. There is nothing between them which at common law would be regarded as a contract. But the statute imposes a liability upon grounds of equity and public policy. . . . We are aware that the greater number of cases call the liability a contract, and, undoubtedly, the relation of a stockholder to a corporation has certain equitable features both of a contract and a guaranty; but we think it much more accurate to say that the liability is a statutory liability simply, incidental to the ownership of stock, than to say that it is a contract": *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 471. See, also, *Marshall v. Sherman*, 148 N. Y. 9, 20, 51 Am. St. Rep. 654.

It is useless, however, to dwell further upon the inquiry, because it has been already answered in this jurisdiction by *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114, 128, wherein it is said—and in accordance with sound reason, as we think: "The liability which the plaintiff seeks to enforce is a mere creature of the statute, having none of the elements of a contract, whether express or implied. It is a naked, statutory liability, entirely unknown to the common law, for the indebtedness of the corporation, ⁵⁵² however it may accrue, whether from the breach of a contract or the commission of a tort. The stockholder is not liable upon the contract in the one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either." For additional authorities which hold that the liability of a stockholder is statutory merely, see *Terry v. Little*, 101 U. S. 216,

217; *New Haven etc. Co. v. Linden Spring Co.*, 142 Mass. 349, 353; *Brown v. Eastern Slate Co.*, 134 Mass. 590, 591; *Halsey v. McLean*, 12 Allen, 438, 440, 442, 90 Am. Dec. 157; *Knowlton v. Ackley*, 8 Cush. 93, 96; *Gray v. Coffin*, 9 Cush. 192, 199; *Cady v. Sanford*, 53 Vt. 632, 637, 638; *Libby v. Tobey*, 82 Me. 397; *Wing v. Slater*, 19 R. I. 597; *Sayles v. Bates*, 15 R. I. 342; *Slee v. Bloom*, 20 Johns. 669, 684; *Bullard v. Bell*, 1 Mason, 243, 288; 23 Am. & Eng. Ency. of Law, 871.

But, irrespective of the foregoing considerations, we are of opinion that the plaintiffs' claim is not enforceable in this jurisdiction upon any just obligation of comity. The provision of the Kansas constitution appearing in the case is plainly not self-executing, and of itself creates no liability whatever: *Hancock Nat. Bank v. Farnum*, 20 R. I. 466; *Marshall v. Sherman*, 148 N. Y. 18, 51 Am. St. Rep. 654, and authorities cited. The only real basis of the plaintiffs' right of action, legal, moral, or equitable, is the fiat of the Kansas legislature; for if it be conceded (contrary to the fact, as we understand it to be) that the courts of that state have directly held that the relation of a stockholder to creditors is contractual, the holding is properly to be regarded as a decision on general legal principles merely, and, as such, not binding upon us. Opinions of courts are not judgments to which full faith and credit must be given under the federal constitution, and there is no rule of comity or law which requires that such opinions should be followed in their interpretation of general legal principles by the courts of other states.

As before stated, it is a principle of universal acceptance in all civilized states that the statutes of one state do not operate extraterritorially, *proprio vigore*, in another. "How far they should be enforced beyond the limits of the state which has enacted them must depend on several considerations; as whether any wrong or injury will be done to the citizens of the state in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees": *New Haven etc. Co. v. Linden Spring Co.*, 142 Mass. 349, 353, per Devens, J.; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114, 127, 128. Whether such statutes should be enforced in another state it is exclusively for that state to determine. The doctrine of comity "owes its origin and authority to the voluntary adoption and consent of nations": Story's *Conflict of Laws*, sec. 36. Its true scope

and ⁵⁵³ extent each sovereignty has the right to determine for itself; and it "must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded": Story's Conflict of Laws, sec. 33.

In our opinion, when the rights sought to be passed upon and determined are those which arise from the relation between a corporation and its creditors and stockholders, they justly depend upon the local law which exists at the place of the corporation's creation, and true policy requires us to leave them to be there determined, regardless of any question of power on our part to enforce them.

And this would seem to be especially so in the case at bar. The alleged obligations of the defendant as a stockholder of the corporation are essentially different from those which arise in this state from that relation, and, furthermore, the plaintiffs properly concede that their form of procedure should have been by an action at law. "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement"; and when it does, "the remedy provided is exclusive of all others, . . . and that alone must be employed": Pollard v. Bailey, 20 Wall. 520, 526, 527; Fourth Nat. Bank v. Franklyn, 120 U. S. 747, 756, 758. "By the statutes of New Hampshire, proceedings to enforce the liability of stockholders, under our laws, must be by bill in chancery. A creditor seeking to enforce it must join in the suit all the parties in interest who can be affected by the decree; the suit must be prosecuted for the benefit of all the creditors, and not for a portion of them. All the stockholders who can be reached by the process must be made defendants. The corporation itself must also be joined; and thus, by avoiding a multiplicity of suits, the whole liability of the corporation is apportioned among the solvent stockholders, who can be reached by the process of the court, and by the decree each stockholder is compelled to pay his proportionate share of the debts; and thus, in one suit, the affairs of the corporation are practically wound up, and its burdens distributed among the share owners": Rice v. Merrimack Hosiery Co., 56 N. H. 128; Erickson v. Nesmith, 46 N. H. 371; Hadley v. Russell, 40 N. H. 109.

But not only are the Kansas statutes relating to the liability of stockholders and its enforcement radically different in theory and practice from ours, but there is no way in which they can be enforced here so as to secure substantial justice, according to the New Hampshire understanding and interpretation of that term. The practical difficulties are numerous, patent, and insuperable. As is said in *Bank of North America v. Rindge*, 154 ~~554~~ Mass. 203, 205-207, 26 Am. St. Rep. 240: "If the plaintiff, as a creditor of the Kansas corporation, can maintain an action against him [the defendant] in Massachusetts for the purpose of charging him as a stockholder, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other states where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different states against other stockholders. In such case, it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others; but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other states. A dishonest creditor might possibly recover several times over against different stockholders in different states, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one state, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different states, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation which has no property with which to respond to a judgment obtained by such creditor against it in Kansas may thereupon, without any further proceedings in that state to charge the stockholders, maintain an action against every stockholder in every state in the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some state, it is obvious that a large amount of litigation might ensue under which substantial justice as among the stockholders could not be worked out. . . . In case of several actions in different states, questions of priority of the claims of cred-

itors might arise upon which the decisions of the courts of the different states might not be uniform, and thus the defendant might be held liable more than once. . . . These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the declaration in other states than that where the corporation is established in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the state where the corporation is established to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined in a manner which will avoid many of the objections ⁵⁵⁵ which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court that such an action, under the circumstances which appear here, ought not to be entertained in this state": See, also, *New Haven etc. Co. v. Linden Spring Co.*, 142 Mass. 353, 354, and cases cited. It is true that under a recent Massachusetts decision by a divided court (*Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232), it must be understood that such an action will now be entertained in that state; but the reasons given in the decision are so unsatisfactory to our minds that we have felt no hesitation in quoting with approval from former decisions of that court to the contrary, which, in our judgment, are so clearly founded on reason and justice as to merit universal approbation.

So, also, it is said by the New York court of appeals, in an action upon the statute now under consideration: "The statute in question, while creating a certain liability on the part of a stockholder to a creditor of the corporation, at the same time gives to the former certain rights as against his fellow stockholders for contribution. It should be administered in such a way as to secure the rights of all in the same action. This is the interpretation which we have given to our own statutes enacted for a similar purpose. It is clear that this cannot be done in this action, since the theory of the plaintiff is, that the defendant is liable in successive actions at law by creditors, suing separately, until he has paid a sum equal to his stock, and then he must resort to some other jurisdiction for contribution. This would be most unjust and oppressive, and it is safe to say that no well-considered case can be found

that sanctions such a principle. While this is not an action for a penalty, yet we think it belongs to a class of cases in which there is no obligation, under any well-recognized principle of the law of comity, to enforce a claim founded upon such a statute. Moreover, the right asserted and the remedy provided are of such a nature that they cannot be given any practical effect here without injustice to our own citizens. We are virtually asked to ignore our own rules of construction and methods of procedure in order to compel the defendant to pay to foreign creditors a sum equal to his holdings of stock, without any power to inquire into the necessity for it by an accounting, or to secure to him any recourse against others equally liable. When the courts of this state are asked to administer the statutes of Kansas, and we can see that the case is surrounded by such complications, and the circumstances are such that it cannot be done without injustice to our own citizens, or that it will be impossible to do full and complete justice to all the parties in interest, it is reasonable and just to decline to administer them at all": *Marshall v. Sherman*, 148 N. Y. 28, 29, 51 Am. St. Rep. 654. See, also, *May v. Black*, 77 Wis. 101; *Wyman v. Eaton*, 107 Iowa, ⁵⁵⁶ 214, 70 Am. St. Rep. 193; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Smith v. Huckabee*, 53 Ala. 191, 196, 197.

It would occupy too great a space, and is not within the time at our disposal, to consider other objections to the plaintiffs' recovery, although "Alps on Alps arise." "There are certain . . . principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute": *Mills v. Duryee*, 7 Cranch, 481, 486; and it is enough to say, that it is only by force of such a statute that the plaintiffs' cause of action, whatever may be its form, can be sustained in this jurisdiction.

Bill dismissed.

All concurred.

CONFLICT OF LAWS.—If a statute creates a cause of action unknown to the common law, it cannot be made the foundation of an action in another state: *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144, 20 Am. St. Rep. 461. However, comity of one state will enforce the laws of another state when such enforcement neither violates its own laws nor infringes the rights of its own citizens: *Deringer v. Deringer*, 5 *Houst.* 416, 1 Am. St. Rep. 150; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780.

CONFLICT OF LAWS—STOCKHOLDERS' LIABILITY.—The statutory liability of stockholders cannot, as a general rule, be en-

forced except in the domicile of the corporation: *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654; though if such liability is contractual, it may be enforced outside the limits of the state: *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835. See, further, the monographic notes to *Fowler v. Lamson*, 37 Am. St. Rep. 168-175; *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 868, 869.

HEDDING v. GALLAGHER.

[69 NEW HAMPSHIRE, 650.]

RAILROADS—SPECIAL PRIVILEGES.—A railway company cannot confer upon one person the exclusive privilege of entering its premises to solicit the carriage of baggage and passengers therefrom to the exclusion of others engaged in the same business.

Bill in equity praying for an injunction to restrain the defendants from interfering with plaintiff's rights under a contract between him and a railroad company, whereby the company granted him the exclusive right to solicit the patronage of passengers upon the railroad grounds. Defendants, after notice from both plaintiff and the railroad company, persisted in going upon the railroad premises to solicit the carriage of baggage and passengers.

O. E. Branch, for the plaintiff.

Sullivan & Broderick, for the defendants.

659 PEASLEE, J. The demurrer raises the question of the extent of the right of one who has undertaken a public business to make contracts which tend to infringe public rights. Those who engage in such business thereby surrender certain rights which belong to private persons. The common carrier is not permitted to carry for A and refuse to carry for B under like circumstances. The innkeeper must, to the extent of his accommodations, entertain all who apply in a proper way. By virtue of their employment, they have impliedly agreed to do these things for all. Their services are public property. Hence it is that, when a question arises which involves their rights or liabilities as to matters touching their duty to the public, the ordinary standards of the rights of private individuals to use their own as they will, or to contract or refuse to contract at their pleasure, afford little or no aid.

If one has entered upon such public employment, he must treat alike all who seek to employ his public services. It is equally true that he must accord like treatment to all who, engaging in another and connecting branch of public service, offer their services to those of the public who are temporarily upon his premises: *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209. In that case it was decided that an innkeeper, at a place from which travelers habitually continued their journeys, could not discriminate between rival stage-drivers as to the privilege of soliciting the patronage of his guests upon his premises. So here, the solicitation of the patronage of incoming passengers, for the continuation of their journeys, is a privilege to be equally enjoyed by all. The attempt to distinguish the cases upon the ground that travelers commonly journeyed from Hanover in public conveyances, while their baggage is usually carried from the Manchester station in some other way, is conclusively answered by the fact that the carriage of baggage by public conveyance is so extensive that the plaintiff agreed to pay one hundred dollars a year for the mere privilege of soliciting such business upon the railroad's premises.

It is also said that "a traveler arriving at his destination upon a railway ceases to be a traveler," and that for this reason *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, does not apply; and, further, that a railway station is not a hotel, where the traveler may stop and claim ^{also} the rights of a guest. If both propositions were sound, his situation would be a perplexing one. He could not stop and consider himself a guest; and if he went on he would not be a traveler and could claim none of a traveler's rights. The traveler doubtless ceases to be a passenger upon the railroad when he leaves its premises; but how he can cease to travel before he reaches his destination beyond those premises is not readily perceived. And, if he continues to rightfully travel, he would seem to be justified in claiming a traveler's rights. His rights at the station do not terminate the instant he alights from the train. He also has the right to a reasonable time and way to leave the station, and to reasonable facilities for the reception of his baggage by whoever is to transport it further. The carrier's duties relating to a passenger's baggage do not necessarily terminate at the same time with those as to his person.

The carriage of baggage is a part of transportation. It is to be expected that when travelers arrive at a railway station

they will have more or less baggage to be carried from there. It is admitted that this is so far a part of the reasonable and customary mode of travel that a person who has a previous contract with the passenger has the right to come upon the station grounds to await the arrival of his patron. The case differs vitally from the so-called analogous ones of keepers of restaurants and venders of papers. A previous contract by a hotel-keeper to serve dinner to an incoming passenger in the station waiting-room would not confer upon the hotel-keeper a right to set a dining-table there in anticipation of the arrival of his guest. Refreshment and entertainment are mere conveniences which the carrier may, if he chooses, provide for the passenger, but it is no part of his duty to do so. In the matter of the further transportation of baggage, he does owe a duty to the traveler. As there is this fundamental distinction between the cases, it is not necessary to consider the result of a decision of this case in an attempted application of it to cases to which the reasoning cannot apply.

The right to enter upon the carrier's premises under a previous contract with a passenger being admitted, the right of those who seek such contract to reasonable and equal facilities cannot be denied upon any satisfactory grounds. It is argued (as in *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661) that the defendants had no right to go upon the premises, and therefore they cannot complain because others are admitted while they are shut out. It is true that no one has the right to go upon the property of a railroad corporation merely because it is railroad property. But this rule applies only so far as the corporation uses its property for private purposes, or in a public use which does not require or allow the admission of the public thereto. When this limit ⁶⁶¹ is passed, and the corporation puts its property to public uses and admits thereto a part of the public, by what rule of law is it allowed to admit one and exclude another? "Public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference), so far as the property is used, or its use is rightfully demanded by the public for whose use it was taken": *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430, 454, 13 Am. Rep. 72. The carriage of baggage is a right of the public. The work to be done is a part of the reasonable and necessary conduct of the public business, of which the railroad was chartered to carry

on another and connecting part. It cannot be changed to a private undertaking by any form of words used in making an illegal agreement, nor by assertions (contrary to the fact) that the journey ends when the traveler and his baggage are left at the station.

The duty to provide equal facilities does not end with the mere act of carriage. It extends to all things which are incident thereto and a substantial part thereof. The carriage of baggage from the station, being in the reasonable and frequently necessary furtherance of a journey partly performed upon the cars, comes within this rule. There seems to be no sound reason for a different rule as to carriers of baggage from a railway station from that which applies to carriers of passengers from an inn: *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209. But it is said that this case does not apply, for the reason, in addition to those before alluded to, that a railroad may acquire its property by the exercise of the right of eminent domain, while an innkeeper has no such power. The grant of this extraordinary right cannot lessen the public obligations of the grantee. On the contrary, it has always been considered a cogent reason for holding the grantee to a strict performance of his public duty. The right can be conferred only upon those who perform such a duty. There is no substantial distinction between *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, and this case. The question in each is, whether the work of a public carrier is so connected with a public right that those who have undertaken another public duty, intimately connected therewith, must treat all such carriers alike. A common carrier, who owes the duty to furnish to passengers for Manchester reasonable and equal facilities at the station there, is bound to accord equal facilities to all who come to that station for the purpose of carrying passengers or baggage beyond its line of road. The rights of the traveling public being involved, all that the road can do is to make reasonable regulations as to how these rights shall be furthered by baggage carriers. It cannot discriminate between them.

The amendment to the bill alleges that the object of this agreement is to regulate the business so that it may be done in an orderly manner. If this is the object, it must be sought by regulation,⁶⁶² and not by the arbitrary admission of one and exclusion of all others. Regulation is not discrimination; and a contract, which so far discriminates that the favored party

pays a substantial sum for the privileges conferred, cannot be considered to be a regulation in any fair sense of that term. If the road had the right to make an exclusive contract, it is immaterial what its object was in so doing. If, as was said in *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, the defendants had no rights in the premises, and the only rights involved were those of the road, there would be no occasion to inquire into the motives of the parties or the reasonableness of the contract. It would be entirely their private business. If it is the road's private business, it would seem to follow that an exclusive contract might be made whereby the road exacted such a sum from the privileged carrier that he in turn must exact unreasonable prices for his services to passengers. When this course of procedure has been carried far enough, it amounts to a denial of the right of the public to have baggage carried in a reasonable way; and, unless a public right is involved, there is no power to prevent it.

It is argued that the right to be preserved is that of the passenger, and that these defendants take nothing by virtue of it. Even if this should be conceded to be true, it would leave the plaintiff in no better position. He sets up an agreement which he says is a legal contract, and he asks a court of equity to protect him in the enjoyment of it. But if it appears that the agreement infringes a public right which the court is bound to preserve, it will not be recognized as a foundation upon which to base a decree: *Indianapolis etc. Co. v. Dohn*, 153 Ind. 10, 74 Am. St. Rep. 274.

It is said that the right of railroads to make contracts regulating their respective charges has been recognized in this state (*Manchester etc. R. R. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582), and that therefore this agreement is valid. But the contracts there referred to are those which directly concern the road's own business and that of its competitors. The reason for sanctioning such an agreement is that it protects stockholders from the suicidal policy of rate cutting by rival lines. No such reason exists here, and no case has been cited wherein it has been held in this state that a public carrier may create and protect a monopoly which does not directly concern his own business interests. "There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the

power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms": *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430, 454, 455, 13 Am. Rep. 72.

The contention that this was merely a letting of the use of a portion of the road's real estate is also without merit. The use ⁶⁶³ of the road's public rooms and platforms has been given over to public purposes. It is not the fact that the station is railroad property that gives value to the agreement here set up, but the fact that the traveling public there have need of the services of connecting carriers. And the public have the right to demand that this need shall be supplied, or, in any event, that the road shall not prevent or hinder such a result. The road cannot derive revenue from this situation by the admission of one such carrier and the exclusion of all others, under the guise that it is a mere letting of the use of its property, or the claim that neither the plaintiff nor defendants could go there as of right. The property consists of the use. The use, so far as travel and its incidents are concerned, had passed to the public, subject only to reasonable regulation. If regulations are needed, they may be made and enforced: *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; but that is the extent of the right of the road to participate in the control of the business of connecting carriers, whose services it is the passenger's right to receive in a reasonable way.

The cases from other jurisdictions upholding agreements like the one under consideration are in conflict with *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, and their reasoning is not satisfactory. The one most relied upon (*Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661) was decided by a bare majority of the court; and its soundness has been denied, not only by three of the seven judges who sat in the case, but also in nearly every jurisdiction where it has since been considered: *Kalamazoo etc. Co. v. Sootsma*, 84 Mich. 194; *Montana etc. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745; *McConnell v. Pedigo*, 92 Ky. 465; *State v. Reed*, 76 Miss. 211; *Fetter on Carriers of Passengers*, sec. 245; 33 American Law Review, 453.

This conclusion renders it unnecessary to consider whether the statute (Pub. Stats., c. 160, sec. 1) is anything more than a declaration of the common law upon this subject: *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430, 455, 13 Am. Rep. 72.

Demurrer sustained.

All concurred.

RAILROADS—EXCLUSIVE PRIVILEGE TO HACKMAN.—A railroad company cannot confer upon one person the exclusive privilege of entering its inclosed grounds to solicit the hack transportation of incoming passengers, and exclude all others from such inclosure who wish to engage in such business: *State v. Reed*, 76 Miss. 211, 71 Am. St. Rep. 528. Compare *New York etc. R. R. Co. v. Scovill*, 71 Conn. 136, 71 Am. St. Rep. 159; and see the extended note to *Kalamazoo etc. Co. v. Sootsma*, 22 Am. St. Rep. 699-702.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

BECK v. PENNSYLVANIA RAILROAD COMPANY.

[68 NEW JERSEY LAW, 232.]

CORPORATIONS—RELIEF DEPARTMENT.—A contract by which an employé of a corporation permits his employer to create a fund in part out of the former's wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employés, or, in case of death, to their beneficiaries, is provided, and by which the employer undertakes to manage the fund, make up deficiencies, and furnish the agreed upon relief, and the employé agrees that the acceptance of such benefits shall operate as a release of all claim against the corporation for damages for injury caused by it, is valid and binding, not opposed to public policy, nor lacking in mutuality or consideration, nor beyond the power of the corporation to make, nor is it an insurance contract.

Action to recover damages for an injury received by one Beck while in the employ of the defendant company and a member of its relief department. He had accepted benefits in accordance with the regulations of such department after receiving such injury.

J. B. Vredenburg, for the plaintiff in error.

W. H. Speer, Jr., for the defendant in error.

230 **MAGIE, C. J.** The argument before us has been mainly directed to the assignments of errors based on the rulings of the trial judge indicated in the statement prefacing this opinion.

The bills of exception show that the rulings in question were made by the learned judge because he deemed the contract

between the company and an employé member of the relief fund, to be void, as opposed to public policy.

In the argument here the rulings are supported on that ground, and also upon the further grounds that the contract lacks consideration; that it is void for want of mutuality; that it is ultra vires the corporation and is forbidden by law.

If the transaction between Beck and the company included an enforceable contract on its part that, in case of an injury to him for which the company would be liable, acceptance of the benefits from the relief fund for such injury should operate as a release of all claims against the company for damages therefor, it is obvious that it was erroneous to exclude the evidence of the contract and of the acceptance of benefits in this case and to submit to the jury the liability of the company for damages which such acceptance operated to discharge. This leads to the consideration of the transaction to discover if a contractual relation between the parties was established, and what contract, if any, arose thereon, and whether it is open to the objections urged against its validity.

That a contractual relation arose out of the transaction is not, in my judgment, open to debate. When the company established a department, with managers and officers paid by it, to gather a relief fund, partly from contributions from such of its employés as might become members, and promulgated regulations for the conduct of such fund and the relief to be given therefrom to every sick and injured member, it became bound to each member as he was admitted to administer the fund according to the stipulations of the regulations, and if it should prove to be insufficient to furnish the agreed on relief, to appropriate thereto of its own money so much as would be ²³⁷ necessary to make up any deficit. Every admitted member contracted with the company on his part to contribute his agreed on share to the relief fund out of his wages, and in other respects to obey the regulations of the department. Such a contract would be implied from his seeking and obtaining admission as a member, but it is expressly set out in the written application for membership. This contract, moreover, is not one made between persons theretofore strangers to each other, but one between persons already having contractual relations as employer and employé, and it deals in part with so much of the wages arising from the contract of employment as the members voluntarily contribute to the fund, which, with other money contributed thereto when necessary,

the employer is to administer in relief of sick and injured members, and the beneficiaries of such as die. The new contract is a part of the contract of employment, as the application declares it to be.

The learned trial judge held the contract between the parties to this action to be opposed to public policy, because he construed it to be a contract by the employé to relieve the employer of its liability to answer for injuries occasioned by its neglect of duty to the employé, and a stipulation on the part of the employé not to hold the employer liable in any event for such injuries. If such is the true construction of the contract, I should not hesitate to assent to the view that it was invalid, for the law will not tolerate a contract between parties by which one agrees that the other may commit a tort to his injury with impunity and without liability to answer for damages. Such a contract would be opposed to public policy.

But in my judgment such is not the correct construction of the contract now under consideration. Reading the regulations and the application together, and particularly the provisions for the payment of benefits from the fund in any case of sickness, injury, or death of a member, the provisions of section 58, respecting the withholding of such benefits in case of an action against the company for injury or death of a ²³⁸ member, and the agreement of the applicant that acceptance of the benefits for injury or death shall operate as a release of claims for damages arising from such injury or death, I think it plainly apparent that the employé, or his representatives, are not debarred by this contract from maintaining such an action, but there is an option afforded thereby, either to seek redress by action or to accept the benefits stipulated for from the fund. The exclusion of the right of action can only arise by the acceptance by the employé of the optional rights to benefits. I can perceive no reason why such a contract may not be made and find in it no opposition to the policy of the law.

What has been said respecting the contract in question disposes also of the objection that it was without consideration or lacking in mutuality. Each of the contracting parties became bound to the other. The contract of each was a legal and sufficient consideration for the contract of the other, and thereby each was mutually bound. In respect to the objections to the contract thus far considered, it is not to be over-

looked that the benefits of the relief fund are not confined to cases where the company would be liable for the injury or death of the member. Benefits are payable to sick members, to members injured and the beneficiaries of such as are killed under circumstances casting a liability upon the employer, and also to members injured, or the beneficiaries of such as are killed, when the injury or death has happened from the hazards of a dangerous employment or the negligence of a coservant, for which no liability of the company could be claimed.

But it is further contended that this contract on the part of the company is ultra vires. This objection could be properly disposed of by pointing out that the company in question is not a corporation of this state of whose corporate powers we may take judicial notice, but a corporation of the state of Pennsylvania. Its charter, conferring such corporate powers as it possesses, has not been put in evidence. We are, therefore, not in a position to say ²³⁹ that the company did not acquire thereby the power to make such a contract as appears in the case. The objection might also be met by the fact disclosed in the case that Beck has accepted the benefits arising under the contract and yet retains what he received thereby.

But I am not inclined to dispose of this objection upon either of these grounds. I will assume that the company was created to build, maintain, and operate a railroad in the state of Pennsylvania, and obtained corporate powers sufficient to enable it to carry out that purpose. We know that it has acquired power in our own state to lease and operate railroads in extension of its system. Upon such assumption and knowledge we must recognize that it has either express or implied power to engage the services of many men, and contract with them as to the compensation they shall receive for their services. Each of such employes is engaged in an employment which subjects him to the hazard of injury and the danger of death. Each is possessed of the liberty to contract with the employer respecting his compensation. A contract by which an employe permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employes is provided, and by which the employer undertakes to manage the fund and furnish the agreed on relief, is, in my judgment, within the implied powers of the employer, if a corporation. On the part of the employer such a scheme may be deemed likely to increase the efficiency of the force it em-

ploy, and on the part of the employé it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not *ultra vires*.

The contract which is under consideration, and other contracts of similar terms, have been sustained against similar objections upon grounds substantially like those above expressed. This has been done in the federal courts: *Owens v. Baltimore etc. R. R. Co.*, 35 Fed. Rep. 715; ²⁴⁰ *Black v. Baltimore etc. R. R. Co.*, 36 Fed. Rep. 655; *Otis v. Pennsylvania R. R. Co.*, 71 Fed. Rep. 136; *Vickers v. Chicago etc. R. R. Co.*, 71 Fed. Rep. 139; in Maryland: *Fuller v. Baltimore etc. Employees' Relief Assn.*, 67 Md. 433; in Pennsylvania: *Johnson v. Philadelphia etc. R. R.*, 163 Pa. St. 127; *Ringle v. Pennsylvania R. R. Co.*, 164 Pa. St. 529, 44 Am. St. Rep. 628; in Iowa: *Donald v. Chicago etc. R. R. Co.*, 93 Iowa, 284; in Indiana: *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; *Pittsburg etc. R. R. Co. v. Moore*, 152 Ind. 345; in Illinois: *Eckman v. Chicago etc. R. R. Co.*, 169 Ill. 312; in Nebraska: *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44; and in Ohio: *P. C. C. Ry. Co. v. Cox*, 55 Ohio St. 497.

The contrary view expressed in Indiana in *Pittsburg etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, was expressly disapproved in *Pittsburg etc. R. R. Co. v. Moore*, 152 Ind. 345. A similar view expressed by a federal court, in *Miller v. Chicago etc. Ry. Co.*, 65 Fed. Rep. 305, was spoken of with disapproval in *Vickers v. Chicago etc. R. R. Co.*, 71 Fed. Rep. 139, by the United States circuit court of appeals, when the case was before it on appeal.

One question remains to be considered, and that is whether the contract which has been found to have been made between the parties is one prohibited by the provisions of our legislation on the subject of insurance. The contention of defendant in error is that by our laws no contract to indemnify any person against loss by casualty to property or health or life can be made by any corporation except one incorporated for that purpose under our laws, or a corporation of a foreign state formed for that purpose which has complied with our laws and obtained authority to transact its business in this state.

If it be conceded that this contention properly exhibits the scope of our laws on this subject, I do not think it effective in respect to the contract now under consideration, because, in

²⁴¹ my judgment, such a contract is not one of insurance within the meaning of those laws.

The purpose of the legislation appealed to is to regulate the business of insurance of various kinds by corporations who propose to do such business, and who hold themselves out as ready to contract for insurance with any person who applies and agrees to the terms on which they offer to insure. If it be conceded that such business is a proper subject of legislative regulation, it is obvious that such regulations are not to be extended beyond the business intended to be regulated. The scheme of the relief department of this company does not contemplate a business of that sort. It is limited to such of the employés of the company as voluntarily apply for admission to the fund and are admitted. They agree with each other and with the company to contribute a portion of their wages to create a fund out of which they shall be paid certain sums in case of sickness or injury, and out of which, in case of death, certain sums shall be paid to the beneficiaries or next of kin. The sum so paid may save from want, but does not increase the estate of the employé: *Golden Star Fraternity v. Martin*, 59 N. J. L. 207.

I can perceive no reason why the establishment of such a fund and the agreement of those who contribute to it as to its distribution can be held to fall within the regulations of the insurance laws. Such an association creates its own fund by voluntary action and distributes it by an agreed upon plan, and the contract between them is not of insurance, but of beneficial relief. As they have neither sought nor obtained corporate powers for their purpose, they are not amenable to prohibitions against the use of corporate powers for that purpose, if any such exists.

The contract of the company with the members of the relief fund to take charge of the fund, to administer it at its own expense and to guarantee that it shall be sufficient to furnish the agreed on relief, is also, in my judgment, not one of insurance within the laws appealed to. A contract of similar import with a railway company which had established ²⁴² what was called a railway insurance society, was held by the court of queen's bench to be a labor contract between employer and employé: *Clements v. L. & N. W. Ry. Co.* (1894), 2 Q. B. 482. The contract before us is the contract of an employer with an employé respecting the compensation the latter shall receive for his labor, and the manner in which it shall be accounted for

and paid for his relief or the benefit of his beneficiaries. The payment by the company of the expenses of management and of contributions, to make up deficiencies is in the nature of additional compensation for labor to those of its employés who enter into this contractual relation with it.

None of the objections to the contract being found to affect its validity, it results that it was erroneous to overrule the evidence of its existence, and its performance on the part of the company, and of the acceptance by Beck of benefits thereunder. Under that evidence the defense of the company was perfect, unless it was met by counter-evidence denying the existence of the contract or the acceptance of the benefits by Beck.

The judgment must, therefore, be reversed. This conclusion renders unnecessary any consideration of the other questions argued.

RAILROADS—RELEASE OF DAMAGES.—An agreement by an employé of a railroad company upon becoming a member of its relief department that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury is valid: *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456; *Ringle v. Pennsylvania R. R.*, 164 Pa. St. 529, 44 Am. St. Rep. 628, and note. But see *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301.

ELVINS v. DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY.

[63 NEW JERSEY LAW, 243.]

MORTGAGES — ACTION AGAINST TRESPASSER.—An owner of mortgaged lands may maintain an action against a trespasser, and is entitled to recover for the entire damage done to the premises, but such recovery is a bar to a subsequent suit by the mortgagee to recover for the same trespass.

MORTGAGES—ACTION AGAINST TRESPASSER.—A mortgagee of lands may first maintain an action against a trespasser thereon, and is entitled to recover such sum as will compensate him for the injury done to the mortgage as a security, and in a subsequent suit against the trespasser by the mortgagor the former may give in evidence the recovery by the mortgagee in mitigation of damages.

WITNESSES—OPINIONS AS EVIDENCE.—A witness who has acquired no special knowledge on the subject is not competent to testify to the value of shade and ornamental trees to a parcel of land.

D. J. Pancoast, for the plaintiffs in error.

J. W. Wescott, for the defendant in error.

243 VAN SYCKEL, J. The declaration in this case charges the defendant company with breaking and entering the plaintiffs' close and mutilating and cutting a number of shade and ornamental trees. The writ of error is prosecuted to review the judgment rendered for the plaintiffs in the trial court.

The plaintiffs owned the premises in fee on which the trees stood, subject to a mortgage. The defendant offered to prove that at the time of the alleged trespass the mortgage exceeded the value of the property, and that the mortgage had been subsequently foreclosed and the premises sold pending this **244** suit for much less than the mortgage debt. The court excluded this evidence, and instructed the jury to find a verdict for the plaintiffs for the full amount of damage done. This is assigned for error. There can be no question that the owner of the fee in possession of real estate can maintain an action of trespass *quare clausum fregit*, although it is encumbered by mortgages.

It has also long been the accepted law in this state that a mortgagee may maintain an action against the wrongdoer for an injury to the mortgaged premises: *Jackson v. Turrell*, 39 N. J. L. 329; *Schalk v. Kingsley*, 42 N. J. L. 32. The question of difficulty arises in ascertaining the rule of damages to be applied to such cases.

In the case now under review the mortgagor, under the direction of the trial court, recovered compensation for the entire damage done by the trespass; and if the trespasser, after satisfying this judgment, is still subject to a suit by the mortgagee in which a like amount may be recovered and made out of his property, it is obvious that great injustice has been done, and that the correct legal rule could not have been applied in this cause.

But to the assumption that this liability exists on the part of the defendant to the mortgagee, and that the trial court is without power to furnish adequate protection to the trespasser, we cannot assent.

In *Jackson v. Turrell*, 39 N. J. L. 329, which was a suit by a second mortgagee, Mr. Justice Dixon said that "the damages recoverable are to be measured by the injury to the mortgage as a security; and, if it be doubtful whether the damages should not go to the first mortgagee, the court will exert its equitable

powers to control the disposition of the fund so that no injustice may be done." In *Martin v. Franklin Fire Ins. Co.*, 38 N. J. L. 140, 20 Am. Rep. 372, it was declared that a like equitable power inhered in the trial court. In the later case of *Schalk v. Kingsley*, 42 N. J. L. 32, a like remedy was accorded to the mortgagee, and it was adjudged that his ²⁴⁵ damages were to be measured by the diminution in the value of his mortgage.

When the mortgagee has instituted the prior suit and recovered his damages, as he may, there is no difficulty about the rule. The owner may still maintain an action for the injury, and the trespasser can protect himself by giving in evidence the recovery by the mortgagee in mitigation of damages.

The owner has suffered damage to the full extent of the injury, but his claim has been satisfied pro tanto by payment to the mortgagee for his loss.

But when the owner alone sues and the case goes to trial upon the issue therein joined, the damages must be commensurate with the loss which falls upon the land by reason of the wrongful act. The damage committed upon the locus in quo is none the less because it is encumbered by a mortgage. The owner suffers to the extent of the entire loss. His premises are diminished in value to the full amount that will compensate for the injury. He is entitled to redeem the mortgage, and he may compel the wrongdoer to restore to him all that he has destroyed and deprived him of.

In Massachusetts, by force and effect of the mortgage, the legal estate vests at once in the mortgagee, and there the mortgagee recovers the full amount of damages done to the mortgaged premises: *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *Page v. Robinson*, 10 Cush. 99.

The damages must be a recompense for the injury done to the property: *Thompson v. Morris Canal Co.*, 17 N. J. L. 480; *Berry v. Vreeland*, 21 N. J. L. 183.

When the owner sues, the property injured is the tract of land, and when the mortgagee is the plaintiff the property injured is his mortgage. In either case the entire injury to the property of the plaintiff is recovered.

When the mortgagor of chattels prosecutes a stranger for taking the mortgaged goods, the established rule of this court is that he is entitled to recover their full value without regard

to the mortgage; he must recover all the damages that both ²⁴⁶ mortgagor and mortgagee can claim, and it necessarily constitutes a legal bar to further recovery by either: *Luse v. Jones*, 39 N. J. L. 707. No reason appears why a different rule shall prevail when the action is for trespass upon lands.

The right both of the mortgagor and mortgagee to seek redress in a court of law being conceded, the equitable power must reside in the court, in a just administration of the law, to control the judgment and proceedings in such a way that the amount recovered shall be appropriated to satisfy the demands of each in accordance with their respective rights, and with the rights of the defendant wrongdoer. There was, therefore, no error in this regard in the trial below.

A further objection to the legality of the proceedings on the trial is that William A. Elvins, a witness produced on the part of the plaintiff, was permitted, notwithstanding objection to his evidence, to testify to the value of the shade trees. This evidence was excepted to by the counsel of the defendant on the ground that it was incompetent, and it is now insisted that it was inadmissible because it was not a subject for expert testimony, and, if it was a matter upon which expert testimony could be received, that the witness did not appear to be possessed of the requisite knowledge to qualify him to testify as an expert.

It certainly requires some special knowledge to be able to estimate the value of trees. If they are to be cut into cordwood, the witness must have some experience to enable him to say how many cords they will make. Whether they can be more profitably disposed of for cabinet-making purposes, for railroad uses, or to the carriage builder, requires still more experience.

The value of trees as shade trees cannot be so accurately computed as their value for commercial purposes, but still that value depends upon the size and variety of the trees, their location on the premises, the time it takes to grow them, and the price which well-shaded residence lots in the same ²⁴⁷ locality have commanded during a period of years, in excess of lots as well situated, but without the attraction of shade or ornamental trees. Such special knowledge, not ordinarily possessed, might be acquired by a real estate agent or by an experienced landscape gardener, and it would be within the domain of expert knowledge qualifying a witness to give evidence of his opinion as to values.

Before the witness was permitted to testify to the value of the trees, he was asked whether he had any knowledge of the value of real estate around Hammonton, to which he replied, "Yes, some." He was then asked whether he knew anything about trees, to which he answered, "No, I don't know as I know much about them." It did not appear that he knew anything about the prices at which real estate had been sold, or about its value, or that he had any knowledge of the subject which was not possessed by everyone in that locality.

While in respect to expert testimony it is somewhat within the discretion of the trial judge whether a witness shall be allowed to give his opinion (*New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. L. 189), still, to render such testimony competent, it must be made to appear that the witness has some special knowledge of the subject. In this case there was an entire absence of any fact to show that the opinion of the witness was entitled to be regarded as evidence. Farmers and land owners may have some special knowledge of the value of real estate in their locality, but that does not imply ability to estimate the cost of erecting a dwelling-house or the value of trees as shade or ornamental trees.

It was error, therefore, in the trial court to allow the witness to testify as to the value of the trees as shade trees, and for that reason the judgment should be reversed.

MORTGAGES—ACTION FOR INJURY TO PREMISES.—A mortgagee, though not in possession nor having the right of possession, may maintain an action against a stranger to recover the value of fixtures by him removed from the mortgaged premises, without regard to the sufficiency of his security, and although the mortgagor has sued the defendant for the same act: *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563. On the measure of damages in suits brought by a mortgagee for injuries to the mortgaged property, see the extended notes to *Webber v. Ramsey*, 43 Am. St. Rep. 432-436; *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153-156.

SAUNDERS v. EASTERN HYDRAULIC PRESSED BRICK COMPANY.

[63 NEW JERSEY LAW, 554.]

MASTER AND SERVANT—CARE REQUIRED OF MASTER.—A master is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of that work, and free from latent or concealed dangers.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—A master is not required to furnish a mullion of a window in a flat roof strong enough to bear the weight, or any part of the weight, of a servant directed to go upon the roof and replace a pane of glass in the window, as the liability of such mullion to break under the pressure required to remove the old putty is as apparent to the servant as to the master, and constitutes an obvious danger, the risk from which is assumed by the servant.

J. W. Wescott, for the plaintiff in error.

N. Grey, for the defendant in error.

555 **MAGIE, C. J.** The judgment in this record was founded upon a nonsuit directed by the trial judge at the trial of the issue made by the pleadings. The action was in tort for damages for an injury suffered by plaintiff. The bill of exceptions shows that the direction of the trial judge proceeded upon the ground that the evidence did not establish any liability on the part of the defendant to answer for the injury received by the plaintiff for which he was prosecuting his suit, and upon the further ground that plaintiff's conduct was negligent and his negligence contributed to his injury. The sole ground of complaint urged for the reversal of the judgment is the alleged error of the trial judge in directing the nonsuit.

At the time the nonsuit was allowed the evidence may be considered to have established the following facts: Plaintiff was a workman in the employ of the defendant. One of defendant's buildings in which it carried on its business had a roof, nearly flat, in which was a "skylight" fitted for two panes of glass, 20x40. The skylight was on about the same plane as the roof, and there was what plaintiff calls a "mutton," meaning, no doubt, a mullion, dividing the frame and sustaining **556** the contiguous parts of the panes of glass. One of the panes was broken, and plaintiff, who was a glazier, was directed by someone having authority from defendant to go upon the roof and put a new pane in the place of the broken one. In at-

tempting to do so, plaintiff put his hand upon the centerpiece or mullion and leaned with so much of the weight of his body upon it as to break it. He had assumed such an attitude or position that, upon the breaking of the centerpiece, he fell headforemost through the window and received by that fall the injury of which he complained.

The rule of duty of the master applicable to the case admits of no doubt or dispute. He is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of that work, and free from latent or concealed dangers: *Essex Co. Electric Co. v. Kelly*, 57 N. J. L. 100; *Comben v. Belleville Stone Co.*, 59 N. J. L. 226. Had plaintiff received his injury by falling through the roof on which he was directed to work, by reason of a defect in its construction, he might claim that defendant was liable for his injury, and a question for a jury would arise whether the master, in respect to the construction of the roof, had used the required care. Under such circumstances the roof was a place furnished by the master for his servant to work upon.

But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight, or any part of the weight, of a servant, although engaged in repairing it.

The duty of the master in this respect is like that of one who invites another to make use of some place or appliance and is limited to the care requisite for the reasonable use thereof for the purposes for which it is designed: *New York etc. Teleph. Co. v. Speicher*, 59 N. J. L. 23; *Speicher v. New York etc. Teleph. Co.*, 60 N. J. L. 242.

⁵⁵⁷ Doubtless the work of replacing the glass would have required the use of some force upon the mullion to remove the old putty. The case indicates that the mullion broke under plaintiff's pressure before he had begun to exert force for that purpose. In that aspect it is plain that defendant was not liable for plaintiff's injury, because, as just stated, it owed him no duty to furnish a mullion strong enough to bear his weight or any part of it.

It is now strenuously argued that the evidence may be construed to justify the conclusion that the mullion broke while plaintiff was using force to remove the old putty so as to put in

the new glass. I cannot so read the evidence. But if it is capable of that construction, the plaintiff's case is not aided, for the liability of the mullion to break under pressure must have been as apparent to the plaintiff as to his master and the danger of breaking was therefore an obvious one. Moreover, the size of the aperture was such that it was wholly unnecessary for the plaintiff to put himself in peril, by exerting upon the mullion a pressure which broke it while he occupied an attitude which prevented his recovering his equilibrium and maintaining his position on the roof. In this respect he was plainly guilty of negligent conduct which contributed to his injury.

The judgment must be affirmed.

MASTER AND SERVANT—SAFE PLACE TO WORK.—A master is bound to furnish his servant a reasonably safe place to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers of which the employé knows nothing, and which he cannot ascertain by experience and observation: *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117. See, too, the notes to *Orman v. Mannix*, 31 Am. St. Rep. 349; *Boss v. Northern Pacific R. R. Co.*, 33 Am. St. Rep. 766, 767.

A SERVANT ASSUMES THE DANGERS ordinarily incident to his employment: *Victor Coal Co. v. Muir*, 20 Colo. 320, 46 Am. St. Rep. 299; *Peterson v. New Pittsburg Coal etc. Co.*, 149 Ind. 260, 63 Am. St. Rep. 289; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475, 30 Am. St. Rep. 745.

HARTER v. MECHANICS' NATIONAL BANK OF TRENTON.

[63 NEW JERSEY LAW, 578.]

BANKS AND BANKING—DUTY TO DEPOSITOR.—The relation between a bank and its depositor is that of debtor and creditor, and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order and in conformity with his directions.

BANKS AND BANKING—FORGED CHECKS.—If a bank makes payment upon a check to which its depositor's name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor unless it shows a right to do so on the doctrine of estoppel, or because of some negligence chargeable to the depositor.

BANKS AND BANKING—FORGED CHECKS.—The return to a depositor of his check with a forged indorsement, together with his balanced pass-book, casts on him only the duty of exercising reasonable care and diligence to examine the vouchers and the account as stated by the bank, and to inform it of any errors thus discoverable.

W. M. Lanning, for the plaintiff in error.

F. S. Katzenbach, Jr., for the defendant in error.

579 DIXON, J. The facts constituting the plaintiffs' side of this case were as follows: On January 29, 1898, Samuel J. Kelly gave them his check for one thousand dollars and directed them to pay the amount to Kate Young on delivery of her bond and mortgage to Howard M. Richards. On the same day a bond and mortgage purporting to be made by Miss Young to Richards were delivered to the plaintiffs by Le Roy Applegate, a lawyer in whose office Miss Young was employed as a stenographer, and thereupon the plaintiffs gave to Applegate their check on the defendant bank, in which they were depositors, for nine hundred and eighty-five dollars, payable to the order of Miss Young. Applegate had forged Miss Young's signature on the bond and mortgage, and he also forged her signature on the back of the check, making it payable to his own order, and, he having added his own indorsement, the bank paid it to him. On February 11, 1898, the bank balanced the plaintiffs' pass-book and returned to them this check as one of the vouchers, but the plaintiffs, not being acquainted with Miss ⁵⁸⁰ Young or her signature, did not then discover the forgery; nor were they informed of it until November, 1898, when they promptly notified the bank. Having then demanded from the bank the amount of the check, they brought this suit to recover it.

There can be no doubt that, on these circumstances standing alone, the plaintiffs were entitled to the verdict which was ordered in their favor at the trial in the Mercer circuit. The relation between a bank and its depositor is that of debtor and creditor, and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order and in conformity with his directions. When, therefore, it makes a payment upon a check to which the depositor's name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor unless it shows a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor: 5 Am. & Eng. Ency. of Law, 2d ed., 1066 et seq.; *Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821; *United Security Co. v. Central Nat.*

Bank, 185 Pa. St. 586; Myers v. Southwestern Nat. Bank, 193 Pa. St. 1, 74 Am. St. Rep. 672.

Reference to the same authorities indicates that the return to the depositor of his check with a forged indorsement, together with the balanced pass-book, casts on him only the duty of exercising reasonable diligence and care to examine the vouchers and the account as stated by the bank, and to inform it of any errors thus discoverable. As, in the present case, the plaintiffs were not in fact acquainted with Miss Young's signature, and there is no ground for claiming that they ought to have known it, they did not fail in duty to the bank by not discovering the forgery on return of the check. Indeed, they were entitled to assume that the bank, before paying the check, had ascertained the genuineness of her apparent indorsement.

581 The prima facie case of the plaintiffs being thus made out, it remains to consider the grounds of defense.

It appeared in evidence that in June, 1898, Kelly, who had then become the owner of the bond and mortgage, called on Miss Young about the interest; that she then told him she knew nothing about such a mortgage; that that was the first she had heard of it, and that she would see Applegate next morning at his office; that on the next morning, at Applegate's office, Kelly first had an interview with Applegate, then the latter had an interview with Miss Young, and immediately afterward Miss Young told Kelly that it was all right and Mr. Applegate was going to settle it soon.

On this evidence the defendant insists, in the first place, that a question of fact for the determination of the jury was raised, whether Miss Young had not thus validated the bond and mortgage, and consequently the indorsement of the check. But we think her words and conduct are not reasonably capable of such a construction. Their manifest import is that the bond and mortgage were not executed by her, but that they placed an obligation on Applegate which she believed he would soon settle and so make the matter right. They give no sign of any sense of obligation or purpose of settlement on her part.

The defendant, secondly, insists that Kelly, by his failure to give to the plaintiffs prompt notice of the forgery, as to which he was at least put on inquiry by what Miss Young told him in June, 1898, had lost his right to recover from the plaintiffs the money which he had left with them to be paid to Miss Young for her bond and mortgage, and which had not been so paid,

and thus the payment made to Applegate had become, as between Kelly and the plaintiffs, a constructive payment to Miss Young, and consequently should be deemed such a payment as between plaintiffs and the bank.

Whatever may be said of the equities of the situation thus presented, this roundabout imputation of negligence cannot prevail at law. The principle on which negligence may preclude a depositor from recovering of his bank the money paid⁵⁸² by the bank on a forged check, is thus stated by Chief Justice Cockburn in *Swan v. N. B. Australasian Co.*, 2 Hurl. & C. 175, 190: "The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action, the right of the banker to immunity from loss so brought about would afford to him a defense to an action by the customer to recover the amount." This view received the approval of the court of exchequer in *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192, and of Chief Justice Gray in *Greenfield Sav. Bank v. Stovell*, 123 Mass. 196, 201, 25 Am. Rep. 67.

This principle affords no foundation for the defendant's proposition, for Kelly's negligence could not form a legal basis for an action by the bank against the plaintiffs.

Looked at in another aspect, the same result is reached. The legal duty of the bank to answer to the plaintiffs for the amount of their deposits did not arise from Kelly's acts, and was not dependent on the state of accounts between him and them, and therefore cannot be affected by showing that he has no claim upon them. His formal release of all claims against them could not impair their legal right to insist that the bank should perform its contract with them as depositors.

The opposite doctrine would involve the plaintiffs in a peril which they should not be required to incur, for the question whether Kelly has lost his right of action against them cannot be conclusively settled against him until he has been heard, and he cannot be heard in the litigation now pending.

We think the proffered defenses were rightly overruled, and the judgment for the plaintiffs should be affirmed.

THE RELATION BETWEEN A BANK AND ITS DEPOSITOR
is that of debtor and creditor: *Hawes v. Blackwell*, 107 N. C. 196,

22 Am. St. Rep. 870; Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162; and the implied contract on the part of the bank is to discharge its indebtedness to the depositor by honoring such checks as he may draw, and it is not entitled to debit his account with any payments except such as are made by his order or direction: Janin v. London etc. Bank, 92 Cal. 14, 27 Am. St. Rep. 82.

BANKS—PAYMENT OF FORGED CHECKS.—A bank is bound to know the signature of its depositors, and the payment of a forged check cannot be debited against the depositor if he is free from neglect or fault. But it is the duty of a depositor to know whether his account with the bank is correct, and promptly to report a forgery; and if he negligently fails to make the examination and consequent discovery when he could have done so, it is as if he had expressly admitted the genuineness of the checks: Note to Myers v. Southwestern Nat. Bank, 74 Am. St. Rep. 676.

OLIVER v. MAYOR AND ALDERMEN OF JERSEY CITY.

[63 NEW JERSEY LAW, 634.]

ACTIONS—VALIDITY OF ACT DONE BY OFFICER—PARTIES.—If an action is instituted, the object of which is only to determine the validity of an act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer is not a necessary party.

OFFICE AND OFFICERS—VACANT OFFICE—CONSTRUCTION OF STATUTE.—Mere words in a statute to the effect that an officer by accepting another office makes the first office vacant, cannot alone make an office vacant or unoccupied which is in fact occupied. The legal meaning of such words under such circumstances is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or if it be an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary to resort to quo warranto proceedings to obtain actual possession of the office.

OFFICE AND OFFICERS—OFFICER DE FACTO.—A person who is legally elected to, and qualifies and enters upon the duties of an office, and subsequently is appointed to and accepts another and incompatible office, but continues to publicly discharge the duties of the first during the term thereof, without any attack made upon his title, or the appointment or election of any other person thereto, is a de facto officer.

OFFICE AND OFFICERS—DE FACTO OFFICER.—A person exercising the functions of a valid public office by color of right must be deemed to be an officer de facto, and his acts protect third persons, although he has legally forfeited his office by accepting an incompatible one.

OFFICE AND OFFICERS—OFFICER DE FACTO.—The official acts of an officer de facto are valid as to third persons, unless the defects in his title are so notorious as to make those relying on his acts chargeable with knowledge. When they see a per-

son occupying a public office by virtue of a public election, and publicly exercising its duties, they are entitled to consider him to be such officer, and to protection as to his acts.

OFFICE AND OFFICERS.—ACTS OF DE FACTO OFFICERS holding under color of title originally lawful, when acting in good faith, afford protection to third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body.

C. L. Corbin and W. D. Edwards, for the plaintiffs in error.

C. D. Thompson and R. V. Lindabury, for the defendant in error.

634 NIXON, J. On September 19, 1898, the board of street and water commissioners of Jersey City passed "An ordinance **635** granting to the Greenville and Hudson Railway Company permission to cross Communipaw avenue with its tracks at grade and regulating such crossing." The ordinance was vetoed by the mayor, but was passed again, notwithstanding the objections of the mayor, on the 3d of October, 1898.

The defendant in error, a resident and taxpayer of Jersey City, was allowed a writ of certiorari, and a judgment of the supreme court was afterward obtained setting aside the ordinance, and this writ of error brings that judgment before us for review.

While numerous reasons are assigned in the record, they all center around two propositions—first, whether the defendant in error has such an interest in the subject matter of the writ as to give him a legal standing to prosecute it. The court below adjudged that he had, and we concur in the conclusion reached by that court and find no occasion to add anything to the reasoning and authority by which it is supported. The second proposition relates to the validity of the ordinance itself. It is contended that the board of street and water commissioners has no power to authorize grade crossings. The court below sustained the right of the board, and in that conclusion also we agree. Such authority is given by the General Statutes, sections 50, 51, pages 471, 472.

But the ordinance is assailed principally upon the ground that it was not legally adopted. The board of street and water commissioners is the governing body of Jersey City, and it enacts all the local laws of that city respecting streets and water. It consists of five members, and the ordinances passed are subject to the mayor's approval, and if vetoed by him may be again passed, notwithstanding his objections, by four votes of the

board: Gen. Stats., p. 465. The ordinance in question was adopted at a regular meeting held September 19, 1898, there being four votes for and one against it. It was vetoed by the mayor on September 28th, and finally passed over his veto on the 3d of October, 1898, receiving the same number of votes. But the contention is that one of them was not such as could give efficacy to the ordinance. It ⁶³⁶ was cast by Robert G. Smith, who had been mustered into the United States service, as colonel of the Fourth Regiment of New Jersey Volunteers, on July 18, 1898. The statute creating the board of street and water commissioners provides (Gen. Stats., p. 465) that "no such commissioner shall accept or hold any other place of public trust or emolument within the elective franchise, nor any appointment to public office, unless he shall first resign his said office, and if he shall accept such other office without having resigned his office of such commissioner, upon his acceptance of such place of appointment his office shall thereupon become vacant."

While there has not been furnished the best proof that Smith actually accepted the office of colonel, yet in the absence of any rebuttal we shall hold, as did the court below, that it is sufficient and that he did accept such office.

It is also insisted by the plaintiffs in error that Smith should be made a party in this proceeding, but we think that where an action is instituted the object of which is only to determine the validity of the act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer himself is not a necessary party. No allegation or proof of bad faith on the part of anyone appears in the record.

The question at issue is thus narrowed down to the efficacy of Smith's vote in the adoption of the ordinance. Without his vote it could not have been passed over the veto; neither could it without every other vote it received; and it is not strictly accurate to say that his vote had any more potency than any other. After his appointment Smith continued to discharge the duties of his office as commissioner and was present and voted when the ordinance was adopted, as the official minutes show. It would, therefore, be a pure solecism to call the office vacant at that time except in the strictly legal sense of having no occupant with a *de jure* title. The acts done by Smith in respect to the adoption of the ordinance were neither more nor less than he would have done

had the Fourth regiment never been organized. It is therefore ⁶³⁷ manifest that the words of the statute (Gen. Stats., p. 465) already quoted, declaring that when a commissioner accepts another office his former office shall become "vacant," cannot mean, in a situation like this, that it is corporeally vacant, for the person lawfully elected to fill it remained in possession, discharging its duties. Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words in such circumstances is that the office had no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or, if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary afterward to resort to quo warranto proceedings to obtain actual possession of the office. Under the old rule of common law, that upon accepting another and incompatible office the first became vacant and the occupant refused to abandon it, a writ of quo warranto to determine the question of incompatibility was the remedy; and where the common law has been superseded by statutes declaring a vacancy under like circumstances and the occupant remains, a similar course must be pursued to obtain possession or such other steps as the facts may warrant. There are familiar precedents in our own state which illustrate the rules here stated. In *Clark v. Ennis*, 45 N. J. L. 69-72, the court said: "It is clear, both upon reason and authority, that a statute declaring an office vacant for some act or omission of the incumbent after he enters upon his duties, does not execute itself." Also, *Clawson v. Thompson*, 20 N. J. L. 689; also, *State v. Parkhurst*, 9 N. J. L. 427, with a difference only in the attitude of the parties. The governor having appointed Parkhurst in Ogden's absence, the new officer took possession and Ogden became the prosecutor to regain possession. Had Ogden remained, the title of the case would have been *State v. Ogden*, with the same result. The same practice prevails in other states, and the rule is clearly stated in *State v. Jones*, 19 Ind. 356, 81 Am. Dec. 403, where it is said: "Where it appears, prima facie, that acts or events ⁶³⁸ have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed before procuring a judicial declaration of the vacancy and ap-

point or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right and oust the incumbent, or fail to oust him, in some mode prescribed by law."

Smith, then, being in the office under color of a legal title at origine, and no other person claiming a right to it, was he a commissioner de facto? Lord Ellenborough, in 1805, in *Rex v. Bedford Level*, 6 East, 356, said: "An officer de facto is one who has a reputation of being an officer, who assumes to be and yet is not a good officer in point of law." This definition has never been questioned, and all those given by the text-writers since are little more than variations of this one. Tested by this ancient or any modern definition, Smith must be held to have been such an officer when this ordinance was passed. He certainly had color of title and reputation, for the legal voters of Jersey City elected him in the spring of 1898 a member of the board for the term of three years, and he duly qualified as such and entered upon his duties with the full knowledge and acquiescence of the public. He had never resigned. The board had not been abolished and his term had not expired. It has been argued and the record shows that he had been absent from several meetings of the board, but it cannot be held that a vacant chair in itself makes a vacant office. Such a rule would work bad results in most of our legislative or governing bodies. The question in a case like this is not whether a member has been frequently absent, but whether he was present and voted when the ordinance was adopted. He did not assert a right which any other person claimed, or perform any official duties that anyone else pretended to have any right to perform in his stead, but only those duties which belonged to the office he was elected to fill and which the law contemplated should be done ⁶³⁹ and the public expected him to do when they elected him, for the law creating the board provides that the judgment and wisdom of five commissioners should determine the questions that arise in the passage of ordinances concerning the streets. The board also recognized his membership. He participated in their proceedings, his name was called and vote recorded in the adoption of ordinances, and, if not present, his absence was duly noted in the official minutes. With all these facts and circumstances appearing in the record, and undisputed,

we must hold that Smith was a commissioner *de facto*. This conclusion is in accord, we think, with the decisions in this state and elsewhere on this subject. In *Dugan v. Farrier*, 47 N. J. L. 383, Mr. Justice Dixon said: "One who assumes an office legally and in good faith remains in it after his title has ended is a *de facto* officer." The same doctrine was held in *Flaucher v. Camden*, 56 N. J. L. 244. In *State v. Anderson*, 1 N. J. L. 318, 1 Am. Dec. 207, it was held that a person in the office of sheriff, although ineligible, was nevertheless sheriff *de facto* and his official acts valid. In *Clark v. Ennis*, 45 N. J. L. 69, a case where the sheriff failed to give bond with sureties, as required by law, and yet continued to discharge the duties of the office, he was held to be an officer *de facto* and his acts valid, although the law expressly declares that if any sheriff shall neglect, refuse, or be unable to give such bond "the office shall expire and be deemed to be vacant." In the case of *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374, one Mr. Hawkes, while holding the office of justice of the peace, was elected to the state legislature and had qualified and entered upon his duties, but continued to act as justice, although the constitution of Massachusetts provided that, upon accepting another office, that of justice should become vacant, but the court, by Mr. Justice Gray, said: "If Mr. Hawkes, by taking his seat in the house of representatives, ceased to be a justice *de jure*, he was, by color of the usual signs of judicial office, sitting in the court, using its seal, and attended by his clerk, and no other person having been appointed in his stead, a justice of the peace *de facto*." Decisions of like import may be found in every state.

640 Smith being a commissioner *de facto* when he voted for the ordinance, it must, upon the application of well-settled legal principles, be held valid and effective as to the rights of the public and third persons. In *Mitchell v. Tolan*, 33 N. J. L. 195, Mr. Justice Depue said: "Premising that an officer is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office, as distinguished on the one hand from a mere usurper of an office, and on the other from an officer *de jure*, the acts of an officer *de facto* are valid as far as the rights of the public or third persons are concerned." In *Woodside v. Wagg*, 71 Me. 207, it was held that "the acts of a person exercising the functions of a valid public office by color of right will be deemed to

be an officer *de facto* and his acts will protect third persons, although he has legally forfeited his office by the acceptance of an incompatible one." In *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, it was said: "The *de facto* doctrine was introduced into the law as a matter of policy and necessity to protect the interests of the public and of individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen, as was said in *Knowles v. Luce*, 1 Moore, 109, that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles of law." In *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213, the court said: "The principle is well settled that the acts of officers *de facto* are as valid and effectual when they concern the public or the rights of third persons as though they were officers *de jure*. The affairs of society could not be carried on upon any other principle." In *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335, Mr. Justice Devens said: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even as far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are ⁶⁴¹ entitled to treat him as such, and should not be subject to the dangers of having his acts collaterally called in question."

But this legal protection is not afforded where the defects in the title of the officer are notorious and such as to make those relying on his acts chargeable with such knowledge. What, then, may be considered notice sufficient to warn third persons and the public? The expiration of the term of an officer and the appointment or election and qualification of his successor, the resignation of a public officer, the abolition of the office itself by an act of the legislature, the refusal of the board or legislative body of which the officer is a member to recognize him, or the judgment of a court against the title of the officer, are such facts as third persons and the public are, as a general rule, required to take notice of. But in this case none of these facts existed, but just the contrary were known to every citizen of Jersey City. All knew that Smith had been legally elected; that he had not resigned; that his term had not expired; that no court had questioned his right

to serve; that no one claimed a right to his seat; that the board had not been abolished; that the members recognized him as one of their number, and that he took part in their proceedings. All of these things were enough to confirm the belief of third persons and the public in Smith's right to serve them. If it was publicly known that he was colonel of the Fourth regiment, it was quite as publicly known on the 3d of October, when the ordinance was adopted, that the war with Spain had ended and only the terms of a formal treaty of peace were being considered. Whether he had in fact accepted the office of colonel, and what the nice distinctions are between *de jure* and *de facto* officers, they could not be expected to know, nor were they bound to know, before accepting the benefits of any ordinance he might by his vote assist in passing. Another significant proof of the general acquiescence of the public in Smith's exercise of the office appears in the fact that the mayor of the city whose veto, as printed in the record, manifests great hostility to the ordinance, well knew that the four votes that first passed it ⁶⁴² could pass it over his veto, and who had the power to fill a vacancy in the board, if he believed that any existed, had failed to make any attempt to appoint a successor, although he had been mustered into service in July. The mayor as the chief representative of the public had, so far as the record shows, acquiesced in his exercise of the office, and in his veto message does not claim that any illegal vote was cast for the ordinance. We find nothing to offset all this public reputation of Smith's right to the office, except a notice by the attorneys of the prosecutor of an intention to apply for an alternative writ of mandamus to compel the mayor of Jersey City to appoint some one as commissioner in Smith's place. By its terms it only contemplated future action, and, when allowed, the hearing was fixed for the 17th of October, fourteen days after the adoption of the ordinance. This notice was served upon the mayor, and also upon the clerk of the board of commissioners. In any event, it was not notice to third persons and the public, and, if they heard of it at all, they would only know that some disputes had arisen as to Smith's title which might become the subject of future and perhaps tedious litigation, the result of which they could not anticipate. The board itself could not be required to stop business upon receipt of such a notice. It cannot be held that when a public legislative or governing body, about to act upon some important

measure, receives a notice from the attorney of some person who is opposed to it that he intends to begin an action which, in its final result, may deprive a member of his seat, that all further proceedings must be postponed until that suit is ended. Congress does not stop business until all its contested seats are settled, nor does any other legislative body.

There are no facts in this case to justify us in relaxing the wise and ancient rule, so deeply rooted in public policy, that the acts of de facto officers holding under color of a title originally lawful, when acting in good faith, will protect third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body.

643 The ordinance in question is one of interest to all of the people of Jersey City, and they are the public whose rights are affected by its validity. The third persons whose rights are involved are the more than four hundred residents and taxpayers in the neighborhood where it is to go into effect, who petitioned the board to pass it, claiming that it will be of benefit to them, and another third party, corporate, is the railway company to which the right is granted to lay the tracks that will, it is alleged, greatly add to the convenience of a system of public traffic extending from Communipaw cove to the great lakes.

The learned counsel for the prosecutor have invited our attention to many cases, but we fail to discover their applicability to the facts in the record before us. There can be no difference of opinion as to all such as hold that when a person filling one office accepts another and incompatible one, his de jure title to the first ceases, and his successor may at once be appointed or elected, or that the acts of an officer whose term has ended and his successor has qualified and taken possession in his stead are void, or that the official acts of a city council done after the terms for which it was elected has expired are illegal; also the acts of a board after it has been abolished by the legislature, or that the acts of one who has not, and never had, any color of title to the office, are void.

But this case rests entirely upon the question whether Smith when he voted for the ordinance in dispute was a commissioner de facto, and his acts, therefore, valid as far as the rights of third parties and the public are concerned. We hold that he was such an officer, and that the ordinance is valid. This conclusion results in a reversal of the judgment of the supreme court setting aside the ordinance.

OFFICE—VACANCY OF.—If a person holding a federal office is appointed to a state office, and these offices are made incompatible by the state constitution, his accepting and entering upon the duties of the state office do not create a vacancy in the federal office; but his right to hold the former may be questioned if he attempts to hold them both: *De Turk v. Commonwealth*, 129 Pa. St. 151, 15 Am. St. Rep. 705. Compare *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279.

AN OFFICER DE FACTO IS ONE who exercises the duties of an office under color of appointment or election: *Hamlin v. Kassarfer*, 15 Or. 456, 3 Am. St. Rep. 176. If an elected public officer continues to exercise the functions of his office after the expiration of his commission, he is an officer *de facto*: *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; note to *Smith v. Bondurant*, 58 Am. Rep. 442, 443. Who are *de facto* officers is the subject of the monographic note to *Hildreth v. McIntire*, 19 Am. Dec. 63-69.

THE ACTS OF OFFICERS DE FACTO ARE VALID when they concern the public or third persons: *Farmers' etc. Bank v. Chester*, 6 Humph. 458, 44 Am. Dec. 818; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

NEW YORK LIFE INSURANCE AND TRUST COMPANY v.
VIELE.

[161 New York, 11.]

WILLS—DOMICILE OF TESTATRIX.—Where a testatrix at the time of the execution of her will was residing in a foreign country, a finding by the trial court that she never changed, nor intended to change, her domicile, but when she made the will, and up to the time of her death, her legal domicile was in New York, is conclusive on appeal, and her will is, therefore, a domestic and not a foreign will.

WILLS—LAW OF DOMICILE.—IN THE INTERPRETATION of wills the law of the domicile must prevail.

WILLS.—THE WORDS "LAWFUL ISSUE," when used in a domestic will, primarily and generally mean descendants; and where there is nothing to the contrary to be found in the context of the instrument, or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used in a will.

WILLS—MEANING OF "LAWFUL ISSUE"—WHETHER INCLUDE CHILD ADOPTED IN FOREIGN COUNTRY.—Where the clear intent of a testatrix, in devising a remainder to the "lawful issue" of her daughter, is to transmit the whole estate to her own descendants, and not to adopted children, although at the time of making the will she knew that her daughter, who lived in a foreign country, had legally adopted a child, such intention controls in the interpretation of the will, and the status of the adopted child under the laws of the country of its adoption is immaterial, even though under such laws the adopted child is considered the lawful issue of the testatrix's daughter.

Charles E. Hughes and Arthur C. Rounds, for the appellants.

Severyn B. Sharpe, for the respondents Viele et al.

R. E. Robinson, for the insurance and trust company, respondent.

¹⁴ O'BRIEN, J. This appeal involves the construction of the third clause of the will of Mary Griffin, who died on the ninth day of March, 1888, at Dresden, in the kingdom of Saxony, one of the states of the German empire. She was the widow of Francis Griffin, of the city of New York, who died there in the year 1852, and the bulk of the property which the testatrix disposed of by the will in question came to her from her deceased husband. This will bears date July 6, 1878, and a codicil thereto July 28, 1882. Both instruments were executed at Dresden, where the testatrix had resided for over thirty years prior to her death, and relate to both real and personal property. The real estate is situated within this state, and the personal, consisting of bonds, stocks, and other securities, was all substantially under the control and management of the plaintiff, the testatrix receiving the rents and income thereof.

¹⁵ The will was executed according to the laws of this state and has been proved here, and the executors appointed resided here. The execution of the trusts and the management of the estate have devolved on the plaintiff, under certain provisions of the will framed for that purpose. The testatrix, after making certain specific bequests, disposed of the residuary estate in trust for the benefit of her children and grandchildren. The true meaning and construction of the trust provision for her daughter Emily has given rise to the present controversy, and that is the only question involved in the appeal. This provision is found in the third item of the will, and is in the following language:

"Item Third. I direct my said executors to safely invest and keep invested one equal one-third part of my residuary estate, and to receive and collect the rents, issues, and profits thereof, and to apply the net income derived therefrom to the use of my daughter, Emily S. Lengnick, during her natural life. Upon her decease I direct that the principal of such share be paid over or transferred by my executors to her then living lawful issue, if any, and if she leaves her surviving no such issue, I direct that the same be then added in equal parts or proportions to the principal of the several shares of my residuary estate hereinafter directed to be held in trust for my ten grandchildren hereinafter named. But if at the decease of my daughter Emily, leaving her surviving no lawful issue, either of these ten grandchildren shall be deceased

and there shall be living lawful issue of him or her, I direct that the part or proportion which would so be added to the share held in trust for such grandchild, if living, be then paid over or transferred by my executors to such issue (per stirpes). And if either of my said ten grandchildren shall die before my daughter Emily leaving no lawful issue who so survive her, I in that case direct that the part or proportion which would so be added to the share held in trust for such grandchild, if living, be paid over or transferred by my executors upon the decease of my said daughter to such of my said grandchildren as are then living, and to the then living lawful ¹⁶ issue (taking per stirpes) of such of them as are then deceased."

The record shows that Emily was married in the year 1857 to Carl Emil Lengnick, an officer in the Saxon army, with whom she lived until her death on August 3, 1893. There were but two children of this marriage, both of whom predeceased the testatrix, dying in the year 1872. It will be seen by the clause of the will above quoted that a remainder was limited upon the life estate of Emily in favor of her "lawful issue," if any survived her, but if not, then over to the other grandchildren of the testatrix for whose benefit trusts were created by other clauses of the will.

The courts below have determined that, since Emily died without descendants, the remainders limited upon her life estate devolve upon the other grandchildren in the proportions specified in the provision quoted. The correctness of this determination could hardly be questioned but for a peculiar state of facts existing when the will was made, and at the time of the death of the testatrix.

It appears that in the year 1876 the defendant Olga Felicitas Heinicke, a niece of Emily's husband, was legally adopted by them in accordance with the law of the kingdom of Saxony and taken into their family with all the rights conferred by such relation under the law of that country. The legal status conferred upon this adopted child by the law of the place will sufficiently appear from the following provisions of the Saxon code, which it is admitted are based largely upon the doctrines of the civil law:

"Sec. 1787. The taking into the relation of children, adoption, can only take place by contract made or acknowledged in court and approved by the sovereign of the adopting party."

"Sec. 1797. The reciprocal legal relationship between an adopted child and the adopting party is the same as that be-

tween a child of the marriage and its parents, in so far as it is not otherwise provided in the contract of adoption."

"Sec. 1808. Children begotten during wedlock and born during the lifetime of their father are from their birth under the paternal power. The same is true ¹⁷ of illegitimate children on the subsequent marriage of their parents, accompanied by a decree of legitimacy by the sovereign, and adopted children on the approval by the sovereign of their adoption, unless they stand in the relations which, according to sections 1832 and 1833, would abolish the paternal power."

"Sec. 2044. Adopted children inherit from the adopting party the same as children of marriage, unless otherwise provided in the contract of adoption, subject to the restriction contained in section 2568."

"Sec. 2046. If, before the death of the adopting party, an adopted son dies leaving descendants born in wedlock, or an adopted daughter dies leaving descendants born in or out of wedlock, such descendants inherit the same share which their father or mother would have taken."

"Sec. 2567. Adopted children and their descendants have the same right to an obligatory share against the party adopting them as descendants of marriage, unless otherwise provided in the contract of adoption."

The articles of adoption and the royal decree approving the same appear in the record, and they contain nothing limiting or restricting in any way the rights conferred by the code upon the children by adoption. Subsequently, Emily and her husband took into their family two other nieces of the husband, who were cared for and treated as children, but were never legally adopted. They have been brought in as defendants in this action, but we do not understand that any serious claim to share in the estate in question has been or can be made in their behalf.

But the learned counsel who has appeared for Olga has presented to the court her claim to the remainder, limited on the life estate of her parent by adoption, in a very learned and elaborate argument. It is not too much to say that his industry has explored practically every source of knowledge on the subject. The reasoning in support of his contention and the collection of authorities to sustain it, has given to the question involved an interest beyond what it would seem to ¹⁸ merit from first impressions. The proposition sought to be established is, that Olga is the lawful issue of Emily, though not related to her by blood, and so entitled to take the re-

mainder under the terms of the will in the trust share of her parent by adoption. The main postulate in support of this contention is, that the legal status of an adopted child, acquired by the law of adoption, is by the law of comity recognized in every other jurisdiction where such status becomes material in determining the right to take property by will or inheritance. The authorities cited seem to give much support to this proposition, and so far as it is involved in or material to this case we need not question it: *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Burrage v. Briggs*, 120 Mass. 103; *Buckley v. Frasier*, 153 Mass. 525; *Sewall v. Roberts*, 115 Mass. 262; *Tirrell v. Bacon*, 3 Fed. Rep. 62; *Hartwell v. Tefft*, 19 R. I. 644; *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370; *Patterson v. Browning*, 146 Ind. 160; *Markover v. Krauss*, 132 Ind. 294; *Atchison v. Atchison*, 89 Ky. 488; *Estate of Rowan*, 132 Pa. St. 299; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Power v. Hafley*, 85 Ky. 671; *Gray v. Holmes*, 57 Kan. 217; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196.

It is said that the status of Olga must be determined by the statutes of Saxony, construed with reference to the doctrines of the civil law upon which they are based, and, thus construed, she has all the rights of a child born in wedlock. In the language of the civilians, being an agnate of the adopting parents she has become a cognate of the members of the family, and so the conclusion is reached that she is, in law, not only the child of Emily, but the grandchild of the testatrix. If the will in question was to be construed according to the foreign law, or the civil law, the argument would doubtless be much stronger than it is, although even then the construction placed upon the Saxon code by the aid of the civil law, which confers upon an adopted child the status of a child of the marriage, not only with respect to the adopting parents, but all the other members of the family as well, would be difficult to maintain, since there is no finding of fact ¹⁹ that gives such construction to the words of the code and foreign laws must be construed in the same light as facts.

But we do not consider it important to determine the precise status of this adopted child, since in the view we are disposed to take of the case it is not material whether she would be considered, under the law of the country of her adoption or under the civil law, to be the lawful issue of Emily or not. Whatever status was conferred upon her by the act of adoption was purely conventional.

The meaning and intention of the testatrix in the use of the words "lawful issue" in her will must be ascertained by the application of the rules and principles sanctioned by the courts of this state in the construction and interpretation of wills. The will in question is not a foreign, but a domestic, will. The fact that the deceased resided in Saxony for over thirty years does not affect the legal character of the instrument by which she disposed of her property. The referee who tried the case found as a fact that the testatrix never changed, or intended to change, her domicile of origin, but that when she made the will, and up to the time of her death, her legal domicile was in the city of New York. This finding, unanimously affirmed in the court below, concludes us with respect to the domicile of the testatrix, and it is so well settled that the law of the domicile must prevail in the interpretation of wills that any discussion of that principle is unnecessary: *Dupuy v. Wurtz*, 53 N. Y. 556; *Moorhouse v. Lord*, 10 H. L. Cas. 283. An inquiry in regard to the legal domicile of a party, involving as it generally does the intention to abandon one or acquire another, presents a question of fact to be determined upon all the circumstances of the particular case, and certainly this case is no exception to that rule. We must accept the finding of the referee upon that question, since the constitution and the statute so command, even if the facts and circumstances upon which the finding is based were not so satisfactory and persuasive as they appear to be.

The words "lawful issue," when used in a domestic will, primarily and generally mean descendants: *Palmer v. Horn*, 20 84 N. Y. 519; *Chwatal v. Schreiner*, 148 N. Y. 683; *Palmer v. Dunham*, 125 N. Y. 68; *Soper v. Brown*, 136 N. Y. 244, 32 Am. St. Rep. 73; *Drake v. Drake*, 134 N. Y. 220; *Johnson v. Brasington*, 156 N. Y. 181. Where there is nothing to the contrary to be found in the context of the instrument or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used in a will. The real question in this case is whether the testatrix used them in that sense or in some other sense. In giving construction to the words used by the testatrix in a domestic will, we cannot assume, without the clearest evidence, that she used the words "lawful issue" in the sense that they might possibly bear in the code of Saxony or that they might be understood by the Roman civilians. Therefore, the question is not what was the precise status of Olga as an adopted child under the Saxon law or under

the civil law, but what the testatrix meant when she devised the remainder to the "lawful issue" of Emily.

We think that the context of the instrument shows quite clearly that she used these words in their primary and general sense as including descendants and not children by adoption.

The ten grandchildren of her own blood for whose benefit she constituted the other two trusts in her will represented two families, descendants of her husband, from whom the property came. They were the children of another daughter still living and of a son who died before the testatrix. It seems that the relations between this daughter and her mother were not friendly, and the only provision made for the former was in the form of an annuity, to which the share of her children was subject by the terms of the will. The grandchildren constituting these two families, ten in all, are carefully enumerated in the will by name as life beneficiaries of two-thirds of the residuary estate, with remainder to their lawful issue. The testatrix, when she made the deed and codicil, knew of Olga's adoption and of her relations to the family of Emily, the other daughter, and her husband. It is quite difficult, in view of these facts, to believe that, if the testatrix intended to make a gift to a child by adoption of a remainder ²¹ in one-third of the estate, that she would omit to mention her name in any part of the will, whereas she did name all her grandchildren by blood. If Olga was intended to be included in the words "lawful issue," she would take, after the death of Emily, one-third of the residuary estate in fee, whereas each of the ten grandchildren by blood would take a life estate only in about one-fifteenth. In the distribution of her property by the testatrix, such a marked discrimination in favor of an adopted child of her daughter and son in law, who was in no way related to her by blood, and against her own descendants, would seem to call for some explanation, and none appears either upon the face of the will or in the surrounding circumstances. A construction of the will should not be favored that would impute to the testatrix an intention apparently so unjust and improbable. If there was any intention to make a gift to Olga of any part of the estate, it is reasonable to suppose that the testatrix would have mentioned her by name as she did her grandchildren in blood. It would be an extreme and almost fanciful construction that would impute to her an intention to make a gift of such a large portion of her estate to one who occupied no other relation to her than that arising

from the fact that she had been legally adopted by her son in law and his wife. The words "lawful issue," when applied to Olga, became so ambiguous, at least, that they could not have been used by the testatrix for the purpose of making a gift to her daughter's adopted child, without at the same time contemplating that they must create and be followed by litigation and discord in the settlement of the estate.

But there is another provision of the will which shows quite clearly that the testatrix could not have intended that the adopted child of Emily should take the remainder in her share. That provision is as follows: "Item sixth. If my daughter Emily dies before me, I direct that the one-third part of my residuary estate directed to be held in trust for her by the preceding third item of my will be added to the other two shares of my residuary estate so as that one-half of the one-third part or share shall be controlled and disposed of by the ²² fourth and the other one-half thereof by the fifth item of this my will." In the fourth and fifth items of the will above referred to, trusts are created in the remaining two shares of the estate for the benefit of the ten grandchildren already mentioned, and the sixth item above quoted provides that in case Emily died before her mother then her share should go, not to Emily's adopted child, but should be added to the shares of the ten grandchildren.

It would be difficult to conceive of a clearer indication of the purpose of the testatrix to transmit the whole estate to her own descendants. The meaning and intention of the testatrix with respect to the remainder which was limited upon the life estate of Emily is not, we think, very difficult to perceive. She evidently had in mind what was quite possible, if not probable, that her daughter Emily might have another child, or other children, born to her before the will would take effect, in which event the remainder would vest in them, but in default of such issue then the other grandchildren, her own descendants, were to take. This is altogether the more reasonable construction to place upon the words "lawful issue" in her will, and this view is reinforced by the settled rule of law which favors such an interpretation as will permit the estate to pass to those persons who are in the line of ancestral blood: *Knowlton v. Atkins*, 134 N. Y. 313; *Wood v. Mitcham*, 92 N. Y. 375; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Scott v. Guernsey*, 48 N. Y. 106; *Kelso v. Lorillard*, 85 N. Y. 177; *Van Kleeck v. Dutch Church*, 20 Wend. 457.

Moreover, if Olga had been adopted under the statutes of this state, she would be precluded from taking anything under this will by the express words of the law regulating domestic relations (section 64), and the same result would follow under the decisions of the courts in cases quite analogous. Under the language of the will, and the law governing its interpretation, the expression "lawful issue" denotes the offspring of Emily only: *Barnes v. Greenzebach*, 1 Edw. Ch. 41; *Schafer v. Eneu*, 54 Pa. St. 304; *Wyeth v. Stone*, 144 Mass. 441.

²³ We think that the judgment of the court below is right and should be affirmed, with costs to all parties appearing who were awarded costs on the appeal below, to be paid out of that part of the residuary estate disposed of by the third item of the will.

All concur, except Martin, J., not sitting.

WILLS.—THE LAW OF THE PLACE where the land lies in case of a devise, or the law of the testator's domicile at the time of his decease in case of a bequest, governs the validity and construction of a will: *Ford v. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117.

WILLS.—THE WORD "ISSUE," when used in a will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as "descendants": *Soper v. Brown*, 136 N. Y. 244, 32 Am. St. Rep. 731.

ON THE RIGHTS OF ADOPTED CHILDREN under wills, see the extended notes to *Van Matre v. Sankey*, 39 Am. St. Rep. 226-228, and *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753.

MATTER OF STICKNEY.

[161 NEW YORK, 42.]

WILLS—REPUBLICATION OF REVOKED WILL.—Under a statute which provides that the revocation of a second will does not revive the first, unless the testator, after the destruction of the second will, shall duly republish the first, such republication must be made with the same formalities as are required in the original publication of a will. Hence a will which has been revoked by a subsequent one which is destroyed by the testator, is not revived by his declaration that he desires his first will to stand, made to others than the subscribing witnesses, and where the persons to whom such declaration is made do not subscribe as witnesses to the will.

Jonas Stickney executed two wills. The first was destroyed by his direction. Subsequently he executed a third will, but

destroyed it the same day it was executed, saying he thought he would keep his old will. Afterward he sent for the second will, read it and declared, in the presence of two witnesses, "This is my last will and testament and is just as I want it." Neither of these witnesses was a subscribing witness to the second will.

Charles F. Tabor and Eugene W. Harrington, for the appellant.

Frank W. Ballard, for the respondents.

44 MARTIN, J. The only question presented for review by this court is whether a will that is revoked by a subsequent one which is destroyed by the testator is revived by his declaration that he desires his first will to stand, made to others than the subscribing witnesses, and where the persons to whom such declaration was made do not subscribe as witnesses to the will.

Who may make a will, how it shall be executed, how revoked, and after revocation how revived, are controlled by the statutes of the state: 2 Rev. Stats., c. 6, tit. 1. To constitute a valid will it must be subscribed at the end by the testator, in the presence of or acknowledged to have been so subscribed to at least two attesting witnesses, be declared to be his last will and testament, and be subscribed by each witness at the request of the testator: 2 Rev. Stats., c. 6, tit. 1, sec. 40. A will may be revoked by another will or by a writing declaring such revocation, executed with the same formalities as are required for the execution of a will, or by being destroyed for the purpose **45** of revoking it by the testator or by another in his presence and with his consent; but where done by another, the consent and destruction must be proved by at least two witnesses: 2 Rev. Stats., c. 6, tit. 1, sec. 42. If a second will is made, its revocation will not revive the first, unless it appears by the terms of the revocation that it was the testator's intention to revive and give effect to the first, or unless, after such destruction, he shall duly republish his first will: 2 Rev. Stats., c. 6, tit. 1, sec. 53.

Obviously, the first sentence of section 53 relates only to the revocation in writing provided for by section 42, and, therefore, to revive a first will under that provision a writing executed with the same formalities as are required for the execution of a will must exist, in which the testator, in express terms, declares his intention to revive and give effect to such former

will. The second sentence of section 53 provides the only other method of reviving a prior will where it has been revoked by a second, which has been destroyed, and requires that where the revocation of the second has been by its destruction, the first will must be republished by the testator.

Therefore, the precise question to be determined is whether the declaration of the testator to persons who are not witnesses to his will was a republication thereof within the provisions of this statute.

In determining the meaning of the statute as to the republication of a will which has been revoked, it is proper to first consider the requirements of the statute in regard to the publication of a will. To render the execution of a will effectual, the testator must declare the instrument to be his last will and testament in the presence of at least two subscribing witnesses. It is manifest that such a declaration by the testator to two or even more witnesses who did not subscribe or attest the will would not be a sufficient publication of it under the statute. The publication must be in the form of a declaration or other communication to the attesting witnesses.

With a clear understanding of the requirements necessary to the proper publication of a will, we are to interpret the provision of the statute relating to the republication of such ⁴⁶ an instrument. Is it to be supposed, after all these formalities and safeguards have been provided by statute as to the publication of a will, that a will which has been revoked, so that it is not a will at all, can be revived with less formality or with less or a different kind of proof than would be required to establish its first publication? We think not.

To publish a will, certain requirements must be observed which are plainly pointed out in the statute, and when an inoperative and thus invalid will is required to be republished, before it becomes effective, we think the same formalities as to its publication must be observed. So far as its publication is concerned, a revoked will is as if it had never been published. If this will had been executed, but not published, it would hardly be claimed that its publication could be established by proof of the testator's declarations to others than the witnesses who subscribed it. We see no reason why the requirements applicable to the publication of a will should not equally apply to its republication. Any other rule would be in conflict with the obvious spirit and purpose of the statute, and would destroy the safeguards against fraud and improvidence

by which the making and publication of wills have been so carefully guarded.

We are of the opinion that it was the intent of the legislature by this statute to require the same formalities and the same proof to establish a republication of a will as are plainly required to establish its original publication, and hence that a will which has been revoked can be revived only by its republication in the presence of its attesting witnesses.

No further discussion of this question seems necessary in view of the very satisfactory opinion of Judge Follett delivered in the court below, where all the authorities bearing upon the question are cited and examined.

The judgment and order should be affirmed, with costs.

All concur, except O'Brien, J., not voting, and Haight, J., dissenting.

Republication of Revoked Wills.*

Republication is used generally in the sense of revival, and does not necessarily, or even usually, mean a distinctive act of declaring a revoked will to be the last will and testament of the maker. Republication, or publication, as an act separate and different from the other acts which enter into the formal execution of a will is required in but few of the states, notably New York and California, and probably this is one of the reasons why the terms "republication" and "revival" have come to be used interchangeably. The rule is prevalent in but few jurisdictions at the present day that the mere revocation of a second will revives, of its own force, the first will. This is mainly due to the passage of statutes which prohibit, either expressly or by necessary implication, such a rule. Of course, where such a rule prevails, no act of republication, on the part of the one whose will it is, is required. This is obviously true. Our chief concern will be with those cases where after the revocation of a second will something further is required in order to bring back to life a former will. These further acts constitute republication, and the authorities are in some conflict, even where similar statutory provisions exist, as to what acts are a sufficient republication.

When Destruction of Second Will Revives Prior Revoked Will.—Two rules seem to have prevailed in England prior to the passage of the wills act of 1838, one of which was administered in the courts of common law, and the other in the ecclesiastical courts. In the common-law courts, it was held as a necessary conclusion of law,

*REFERENCE TO MONOGRAPHIC NOTES.

Revocation of wills: 28 Am. St. Rep. 344-362.

Revocation revival, and republication of wills: 45 Am. Rep. 327-344.

Revival of one will by revocation of another: 76 Am. Dec. 652-656.

admitting of no proof to the contrary, that the mere destruction, with intent to revoke, of a will containing a revocatory clause, revived a former will which had been preserved uncanceled: *Goodright v. Glazier*, 4 Burr. 2512; *Harwood v. Goodright*, 1 Cowp. 87; *Rudisill v. Rodes*, 29 Gratt. 147. This rule of the common-law courts has been adopted in some of the United States: *Randall v. Beatty*, 31 N. J. Eq. 643; see *Marsh v. Marsh*, 3 Jones, 77, 64 Am. Dec. 598. And the rule prevailed whether the first will was revoked by the express terms of the second will or by implication merely. The reason for the rule was found in the nature of a will itself, since it was ambulatory in character and could never become final and absolute until the death of the testator. As the original will was revocable in character, so also was the revoking will, and the revoking will had no final effect until the testator's death. If, therefore, it was destroyed prior to his death, the former will was restored and left to operate in the same manner as if the revoking will had never been executed: *Rudisill v. Rodes*, 29 Gratt. 147. It must be shown in fact that the first will "was revoked by another will which subsisted at the death of the testator," said Lord Mansfield in *Harwood v. Goodright*, 1 Cowp. 87; "because if a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterward destroy the revocation, the first will is still in force and good." There is some difference of opinion as to whether an implied revocation of a will is of the same character as an express revocation. Certainly, in those jurisdictions where an express revocation does not completely destroy the first will, and the first will is revived by the destruction of the revoking instrument, an implied revocation, which would occur where a second will is made, could have no greater effect. But in those states where an express revocation means what it says, and completely wipes out the original will, an implied revocation will not always be construed to have the same effect. This rule was recognized by *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, where it was held that the execution of a will, which contained no express clause of revocation, did not, of its own force, operate to revoke a former will; and hence the subsequent destruction of the second will by the testator would effect a revival of the earlier one. The reason for such a holding is the same as that assigned where the second will expressly revokes the first, viz., that all wills are, in their nature, ambulatory until the testator's death, and until that time neither the first nor the second will can become operative: See, further, *James v. Marvin*, 3 Conn. 576; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685; *Lawson v. Morrison*, 2 Dall. 286, 1 Am. Dec. 288; *Flintham v. Bradford*, 10 Pa. St. 82. Still another doctrine has been applied in some cases, which is that where the destruction of a will is connected with the making of another will, so as to fairly raise the inference that the

revocation was intended to depend upon the efficacy of the new disposition, such will be its legal effect, and if the new will is inoperative from any defect, the revocation fails, and the original will remains in force: 1 Jarman on Wills, *135; *Hairston v. Hairston*, 30 Miss. 276; *Wolf v. Bollinger*, 62 Ill. 368; 1 Woerner's American Law of Administration, *90. This doctrine is not applicable, however, where the original will was canceled with intent to revoke it, although there was an intention to make a new will at a future time: *Estate of Olmsted*, 122 Cal. 224.

Where a statute provides that the destruction of a second will shall not, ipso facto, revive a former will, an implied revocation is as effective to destroy the original will as an express revocation. Under such a provision, however, it seems that a codicil, which impliedly revokes a will in part, by reason of inconsistent provisions, is not a "second will" within the meaning of the statute, and, therefore, if such a codicil is destroyed with the intent to revoke it, those provisions of the will, which were revoked by its execution, are revived: *Matter of Simpson*, 56 How. Pr. 125. In some states, even when a will is only revoked impliedly, it is gone forever, and requires some express and direct act to revive it: *Bohanon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631; see *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456.

In these cases which we have just been considering, then, where the mere cancellation of a revocatory will revives the prior will as a matter of law, republication as a separate act is unnecessary, since the law of its own force restores and renders operative the original will.

The Mere Destruction of a Second Will Does not Revive a Prior Revoked Will.—This was the rule recognized and enforced by the ecclesiastical courts, as distinguished from the courts of common law. In these courts there seems to have been no presumption either in favor of, or against, the revival of a former uncanceled will, upon the cancellation of a later revocatory will. The question was purely one of intention, and was decided solely according to the facts and circumstances: *Usticke v. Bowden*, 2 Add. Ecc. 116; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. In the states of this country the rule of the ecclesiastical courts has found the most favor, and, where not established by judicial decision, has been made the prevailing rule by statute. In *Scott v. Fink*, 45 Mich. 241, it is said that this rule is most consonant with our system and with popular understanding, and at the same time the most reasonable and safe. The authorities which sustain this doctrine place their decision upon the ground that while a will itself may be, and is, ambulatory in character until the testator's death, this is not true of a clause of revocation or of any other act effectively destroying a will. As was said in *Bohanon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631: "A will is ambulatory, and has no effect until the death of the testator. If he lets it stand until his death, it is his will, but if

revoked. It cannot be. But when revoked, it cannot be considered as having either a present or a potential existence, and must require some express and direct act of the testator, which, in fact, does not revive the defunct will, but adopts it as the present will of the testator, and it is to be regarded as a new testamentary act of the party." That a clause of revocation is not necessarily testamentary in character, and might as well be executed as a separate instrument, was recognized in *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. This case adopts for Massachusetts the rule of the ecclesiastical courts. In stating its reasons for doing so, the court said: "The fact that it [the clause of revocation] is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances." Even in the absence of any statute, this is the sounder rule. An express revocation is a positive act, and operates of its own force. It absolutely annuls the previous will, and is not dependent on the continuing in force of the will in which it is found: See *James v. Marvin*, 3 Conn. 576; *McClure v. McClure*, 86 Tenn. 173; *Hawes v. Nicholas*, 72 Tex. 481; *Colvin v. Warford*, 20 Md. 357, 391; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649. It has been held that the obliteration of an exception in a will does not restore the operation of the general clause, freed from the exception, without a republication: *Pringle v. McPherson*, 2 Brev. 279, 3 Am. Dec. 713. While it usually requires an express revocation to destroy the prior will, it has been held that an implied revocation by a subsequent inconsistent will has the same effect, and even in such a case the first will is gone forever, and requires some express or direct act to revive it: *Bohanon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631. In many of the states statutes have been passed which declare that the mere cancellation of a will containing a revocatory clause does not revive a former revoked will. This is true in New York, California, Virginia, Ohio, Indiana, Missouri, Kentucky, and undoubtedly in other states as well: See *In re Lones*, 108 Cal. 688; *Rudisill v. Rodes*, 29 Gratt. 147.

In those jurisdictions, then, which hold that the mere destruction of a later will does not revive a former revoked will, the question of necessity arises as to what acts on the part of the testator will be sufficient to restore his original will and make of it an effective instrument to dispose of his property. In other words, what republication is necessary in order to revive an otherwise annulled will. Is an oral republication sufficient, and, if so, under what circumstances? Or must the revival be evidenced by a writing, which will, in effect, amount to a re-execution? The authorities are not harmonious upon this question, though the conflict in judicial opinion is much more apparent than real.

Parol Republication of Revoked Will.—The statement is frequently seen that any act or expression on the part of a testator which shows an intention to treat a prior revoked will as a present valid instrument is a sufficient republication of such prior will, where there is no statute requiring republication in a specified manner. It is said that nothing more is needed to re-establish a will than a mere parol declaration of an intention to regard a revoked will as existing. Thus in *Linginfelter v. Linginfelter*, Hardin, 127, a will which expressly revoked a former will was destroyed with an intention to give effect to the testator's former will, and the court entertained oral evidence to establish his intention, and held the will valid. In *Harvard v. Davis*, 2 Binn. 415, it was admitted that "anything that expressed the testator's intention that the will should be considered as of a subsequent date was sufficient." And in *Jones v. Hartley*, 2 Whart. 110, it was held that parol evidence of republication was proper in Pennsylvania. To the same effect is *Wallace v. Blair*, 1 Grant Cas. 75. The supreme court of Massachusetts, in *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, stated that oral declarations of a testatrix as to her intent to revive a prior revoked will were proper evidence to be considered in determining whether such revoked will was revived or not. Though this statement was but a dictum, it seems to have established the rule for that state: See *Williams v. Williams*, 142 Mass. 515.

With the possible exception of the Massachusetts case, we do not believe that any of the cases cited establish the bare doctrine that where a will, which contains a clause revoking a former will, is canceled with the intention of reviving the former will, parol evidence is admissible to establish such intent and to restore the first will. Or, in other words, these cases do not establish the rule that a revoked will may be republished by mere parol declarations. The correct rule is that the republication of a will must be accompanied by the same solemnities as were necessary to the publication in the first instance. The English cases, which are frequently cited to sustain the rule allowing parol republication, must be read in the light of the English statutes, and in connection with the formalities which were required in the publication of a will in that country. Prior to the wills act of 1838 in England, no solemnities of any

kind were necessary to make a will disposing of personal property. The will was not required to be in the handwriting of the testator, he need not sign it, and subscribing witnesses were unnecessary. It is needless to cite cases to sustain this: See 29 Am. & Eng. Ency. of Law, 159, 184, 329. With the law thus as to the original execution of a will, it is obvious that its publication could be proved by parol. Clearly, then, its republication would demand no higher form of proof, and it must inevitably follow that parol republication was proper. The English cases are, therefore, in harmony with the rule that the republication of a will should be accompanied by the same solemnities as were necessary to its original publication, because no solemnities whatever were required on either occasion. This condition of the English law relative to wills of personalty prior to 1838 has been overlooked in most of the cases seeking to apply English decisions to wills executed in this country. For example, in *Linginfelter v. Linginfelter*, Hardin, 127, the English cases were cited to sustain a will, the republication of which could only be established by parol, although it appears from the opinion that certain solemnities were required in the original publication of the will. The decision, we believe, is erroneous. It is not the law of Kentucky at the present day, statute having changed it. The Pennsylvania cases, sustaining the validity of parol republication, do so upon the declared ground that a parol publication is good, and, therefore, a similar republication must be. Republication requires the same solemnities, but no others, as were necessary to the first publication: *Harvard v. Davis*, 2 Binn. 406, 419. In approving this doctrine, the court, in *Jones v. Hartley*, 2 Whart. 103, said: "In Pennsylvania, the witnesses to a will need not be subscribing witnesses. If there be a will in writing, signed by the testator, it is sufficient that it be proved by any two witnesses who can establish the fact, whether they attested as witnesses or not. As, therefore, the original proof of the will may be by parol, so may the proof of republication; but the number of witnesses must be the same. In this respect, our law stands on the footing of the English law, under the statute of 32 Henry VIII. prior to the statute of frauds; and under the statute of Henry VIII, the decisions in England were uniform in favor of receiving parol evidence of the republication of a will in writing; and it was held anything which expressed the testator's intention that the will should be considered as of a subsequent date, was sufficient." In *Battle v. Speight*, 10 Ired. 459, where the statute required certain solemnities in the publication of a will, the court expressed it as a matter of great doubt whether the republication of a will could be proved merely by parol evidence of the declarations of the testator. The supreme court of Iowa, in the well-considered case of *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534, after reviewing the authorities upon the question, said: "It is quite clear that it is not settled that a will, to the due execution and original publication of which subscribing witnesses are neces-

sary, can, after revocation, be republished by parol. The doctrine deducible from the authorities seems to be that, in the absence of statutory provisions upon the subject, the same formalities are necessary to the republication of a will as are required for the original publication." This, we believe, is the correct rule, supported by the weight of authority: See *Witter v. Mott*, 2 Conn. 67; *Jack v. Shoenberger*, 22 Pa. St. 416. The case of *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, seems to establish a contrary rule, because it recognizes the efficacy of parol evidence to establish a revoked will, and at the same time the statutes of Massachusetts required that a will to be duly executed must have three subscribing witnesses, and that to admit it to probate it must be proved by at least one or more of these subscribing witnesses: See Mass. Stats. 1882, pp. 747, 754. Publication could not, in Massachusetts, be proved by parol evidence, and it is difficult to see upon what theory republication could be established by the mere oral declarations of the testator. The court in its opinion admits the danger of receiving such evidence. We do not believe the decision is sound, or that it has any substantial support from the authorities. The decisions favorable to oral republication are frequently cases where it is a matter of doubt whether the original will was ever revoked or not, and the evidence tends to support the proposition that it was not revoked. If the will was not revoked, it is clear that any republication is unnecessary. Thus in *Marsh v. Marsh*, 3 Jones, 77, 64 Am. Dec. 598, the testator executed a second will solely because he thought his first will was lost, and, upon finding it, he destroyed his second will. Here there appeared no intention to revoke the first will. And in *Williams v. Williams*, 142 Mass. 515, the testator executed three wills, with the intention of keeping all until he decided which one he wanted, and then to destroy the other two. He afterward destroyed the first and third wills, and the second was sustained as having been revived. There was in this case, however, no real executed intention of revoking the second will.

That republication requires the same solemnities as the original publication is seen further from the statement in *Jones v. Hartley*, 2 Whart. 103, that proof of republication must be had "by the same number of witnesses, and be as conclusive of the facts as would be required to establish an original will." Again, it has been pointed out by Mr. Schouler that if the revoking instrument is not destroyed, but still remains in existence, the sanctioning of parol republication is to dispute the plain effect of a writing by oral and less solemn testimony, which should be discouraged: Schouler on Wills, sec. 445.

No Parol Republication of a Devise of Real Property.—Prior to the statute of frauds a will devising real property could be republished by parol in the same manner as a will bequeathing personalty. No formalities of any kind were required in the execution of an original will devising real estate, and such a will could be proved by parol. The rule followed, naturally, that the same will could be repub-

lished by parol. No greater evidence was required to re-establish a will than was necessary to establish it in the first instance: See *Beckford v. Parnecott*, Cro. Eliz. 493; *Jackson v. Hurlock*, 1 Amb. 494. With the enactment of the statute of frauds, however, real property could only be devised by a will executed in a certain prescribed manner. And the statute further provided that such a will could be republished only by a re-execution or by a codicil duly executed according to the statute: See *Cogdell v. Cogdell*, 3 Desaus. Eq. 346, 366; *Matter of Simpson*, 56 How. Pr. 125; *Jackson v. Potter*, 9 Johns. 312. This provision of the English statute of frauds seems not to have been adopted in Pennsylvania, as is indicated by the earlier cases, and in consequence a will devising real property could be republished by parol evidence: *Jones v. Hartley*, 2 Whart. 103; *Harvard v. Davis*, 2 Binn. 406. It seems to be a matter of some doubt whether the present rule in Pennsylvania is the same: See *Broe v. Boyle*, 108 Pa. St. 76, 82; *Fransen's Will*, 26 Pa. St. 202. But where the English statute of frauds prevails, or a similar statute has been enacted, a will devising real property can be republished only by a re-execution, or by a codicil executed with the formalities required in the making of a will.

Republication as Affected by Statute.—From what has been said it is clear that, in the absence of a statute requiring certain formalities in the original execution and publication of a will, no solemnities are needed in order to republish the same will if it has been revoked. Parol republication is, in such a case, adequate to revive the revoked will, since to require more would be to demand a higher proof to show republication than is required to establish its original execution. This is the only case in which it is altogether certain that the mere oral statement of a testator that he desires a previously revoked will to stand as his last will and testament is sufficient of itself to revive an otherwise defunct will. Where, however, a statute exists requiring the observance of certain formalities in the execution and publication of a will, the question as to what is an adequate republication becomes one of some doubt, if not difficulty. Of course, if the statute specifies the solemnities which must be observed in the republication, then republication becomes, like the original execution and publication, a mere matter of following the requirements of the statute. Thus in England, under the wills act of 1838, republication can take place only by a re-execution or by a duly executed codicil. In such a case, the duty of a testator is clear, and if he desires his first will to stand, after it has been revoked by a later will, he must re-execute it. This rule prevails in some of the states of the Union. Such a statute has been passed in Kentucky, and under it the supreme court has held that a will once revoked by marriage or otherwise can be revived only by a valid re-execution. The mere subsequent recognition will not revive it: *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320. A similar statute prevails in Virginia: See *Phaup v. Woolridge*, 14

Gratt. 332. In Vermont, the provision of the English statute of frauds relating to the republication of wills of real estate was adopted, and a similar provision was added making the statute applicable to bequests of personalty. Consequently, there can be no parol republication of wills in that state—there must be a compliance with the statute: *Warner v. Warner*, 37 Vt. 356. In Georgia, the statutory provision requiring a re-execution or a codicil executed with due formalities in order to republish a will has been modified to this extent that there may be a parol republication if made in the presence of the three witnesses who were the subscribing witnesses to the original will: Ga. Code 1895, sec. 3348. See *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649, for the original rule requiring re-execution. To the same effect, see *Love v. Johnston*, 12 Ired. 355; *Sawyer v. Sawyer*, 7 Jones, 134.

More frequently, however, the statute does not prescribe a complete re-execution for the purpose of reviving a will already revoked. There may be either no specific provision at all, or the statute may prescribe merely that the will shall be republished. What is sufficient republication in such case becomes a matter of judicial interpretation. Where the statute makes no provision for republication, but simply requires that in the original execution and publication of the will certain solemnities must be observed relative to the signing of the will by the testator and by subscribing witnesses, the weight of authority and the better rule is that mere parol republication is wholly insufficient. The question was very carefully considered in *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534, and the court held that where subscribing witnesses were necessary to the due execution and original publication of a will, it could not, after revocation, be republished by parol. "The doctrine deducible from the authorities seems to be that, in the absence of statutory provisions upon the subject, the same formalities are necessary to the republication of a will as are required for the original publication." And in *Witter v. Mott*, 2 Conn. 67, it was said that "when a will has been revoked in due form, by a written declaration, it cannot be set up or republished by parol."

Again, the statute may provide that the manner of reviving a former will shall be by due republication, or by a revocation of the last will executed with the same formalities as are required in the making of a will and by the express terms of such revocation reviving the former will. In substance these are the provisions of the California Civil Code, sections 1292 and 1297. Where the former will is revived by the terms of the instrument revoking the later will, the republication is sufficient, and the republication has in fact been made with the same solemnities as were required in the original execution and publication of the will: See, also, *In re Lones*, 108 Cal. 688; Ala. Civ. Code 1886, secs. 1968, 1969. But where the statute states that a will may be revived by "due republication," what formalities are required? It is certain that mere oral republication

is not sufficient, any more than it is where the statute wholly fails to provide for republication: *In re Lones*, 108 Cal. 688; *Barker v. Bell*, 46 Ala. 216. And while in both of these cases oral republication will not revive a will, the question as to what precise formalities are necessary has not been extensively litigated, and in some states is a question of some doubt. If the original will is intact, and the signatures of both the testator and the subscribing witnesses remain, is it necessary that there should be a re-signing by the testator or by the witnesses? While the authorities are very meager upon this question, we believe the correct rule to be that at the time of republication there must exist precisely the same conditions as are necessary at the original execution of the will. For example, taking the provisions of the California Civil Code respecting the execution of a will, there must be (1) a written will, (2) subscribed at the end by the testator, (3) the subscription having been made in the presence of attesting witnesses, or acknowledged by him to them, (4) the testator must declare to the witnesses that the instrument is his will, and (5) two witnesses must sign at the testator's request and in his presence. Now, if such a will has been revoked, but preserved intact, it would seem that at the time the testator wished to republish it there would be in existence (1) a written will, (2) subscribed at the end by the testator, (3) the subscription having been made in the presence of subscribing witnesses, and (4) the signatures of two witnesses, who signed at the request of the testator and in his presence. The written will and the proper signatures of the testator and the witnesses are mere physical characteristics. The testator when he revoked this will merely destroyed its efficacy as his last will. He did not obliterate the writing or erase the signatures. These being in existence, there would seem to be no necessity for requiring that the will itself or the signatures should again be reduced to writing, provided the witnesses are still alive. The law never requires the doing of an idle act, and the mere rewriting of the will and the signatures would appear to be nothing more than this. The only act wanting in such a case would be the declaring by the testator to the attesting witnesses that the instrument is his last will and testament. Schouler on Wills, at section 443, states that if the signature remains intact, there need be no subsequent signing to revive a will, if it is acknowledged as his will before the proper witnesses. While he cites no authority for this, it would appear to be the correct rule, and the decisions point that way. In *Barker v. Bell*, 46 Ala. 216, after stating that revocation destroys a will and it ceases to be a testamentary disposition of property, the court says: "And if the party who made it desires to make a testamentary disposition of his estate, he must make a new will, in the manner required by the statute. But in doing this, he may use the same form of words, without variations or with variations, as often as he pleases, and the same written or printed document that was used at first, but the process

of making the will must be the same each time; that is, it must be done as prescribed by statute." This countenances the doctrine that the same will may be used in its entirety if it is intact. The facts of this case show that the names of the testator and of the witnesses had been torn off when the will was revoked. The will as an executed document was, therefore, impaired, and since the statute required that for the due execution and publication of a will the testator must sign it and it must be attested by certain witnesses, these formalities must be observed in the republication of the will. The court observed that "there can be no republication of a will that has been revoked by tearing off the names of the maker and the attesting witnesses, unless the will is re-signed and reattested, as required by the statute. The signing of the will and the attestation of this signature are essential formalities that cannot be dispensed with." In *Reynolds v. Shirley*, 7 Ohio, pt. 2, p. 39, the will had been properly signed by the testator and was in that condition at the time of the republication of the will ten years later. The Ohio law required a signing by the testator, attestation of witnesses, and publication. The court in holding that a re-execution would require a repetition of the same formalities, said that a reacknowledgment in writing on the will itself, which is signed by the attesting witnesses, was a good republication, and that it was unnecessary for the testator to sign the will again or the acknowledgment. The principal case is in harmony with these cases and with the rule we have laid down, and recognizes that to constitute a valid republication the testator must acknowledge the instrument to be his last will before the witnesses who have already signed his will, or if before other witnesses, then these witnesses must sign the will at the request of the testator. The rule is correctly stated in this case when it is said that the statute was intended "to require the same formalities and the same proof to establish a republication of a will as are plainly required to establish its original publication." The principal case, in effect, overrules the case of *Matter of Simpson*, 56 How. Pr. 125, where it was stated that a parol republication of a revoked will was valid if made in the presence of any two witnesses, who were not required to be subscribing witnesses. This case makes a most erroneous application of the English rule which sanctioned a parol republication of wills bequeathing personalty. The English rule, as we have pointed out before, permitted parol proof to re-establish a revoked will for the simple reason that the original will could be established by the same kind of proof, and this was the sole reason for the rule. No solemnities were required to execute and publish a will in the first instance, and therefore it was a reasonable holding that no greater solemnities should be required to republish or revive the same will after it had been revoked. In New York, however, solemnities of the most particular kind were required by the statute in order to duly execute and publish a will, and to hold that nothing was required to republish a

will than a simple oral statement to any witnesses that the will was the testator's last will was illogical, and the English cases cited to support it were not and could not be analogous. While many of the states do not require publication of a will as a distinct act in its execution, as is required in New York and California, we believe that republication of a will has practically the same meaning in those states that it has elsewhere. Republication means revival, and is tantamount to an entirely new execution. Where certain formalities of the original execution are still in existence, as for example the signatures of the testator and of the witnesses, these need not be repeated, and only those solemnities which are missing need be observed: See *Simmons v. Simmons*, 26 Barb. 68, 76.

Republication by Codicil.—One of the most frequent methods of republishing or reviving a will is by means of a codicil. Especially is this so where the will has been revoked by the marriage of the testator or testatrix: *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495; *Kurtz v. Saylor*, 20 Pa. St. 205; *Brown v. Clark*, 77 N. Y. 369. The codicil must be executed in the same manner as is required for a will: *Brown v. Clark*, 77 N. Y. 369. In *Proctor v. Clarke*, 3 Redf. 445, it was held that the codicil must be executed as the last will and testament, and that declaring it to be a codicil to the testatrix's last will and testament, and reaffirming the latter was not declaring it to be a will, and, therefore, was not sufficient to revive the will under the New York statute, which required that the revoked will must be republished. If this decision means that the testator must declare the executed codicil to be his last will, it has not been followed by other decisions to the same effect, and the ruling does not seem to be sound. A codicil is not the testator's main will, and all that is necessary is that the codicil should be executed with the same formalities required in the execution of a will; then if the codicil refers to the revoked will and reaffirms it, this is sufficient, even though the will is not in terms republished: *Brown v. Clark*, 77 N. Y. 369. In this case the codicil referred to the will and expressly adopted and reaffirmed it, and the court held that the due execution and publication of a codicil is a republication of the will to which it refers. This last statement is, without doubt, the correct rule. In *Brown v. Clark*, 16 Hun, 559, which was the same case before appeal, it was said that the will itself need not be re-executed, reacknowledged, or republished, but it is sufficient if there is a clear and distinct recognition of the existence and validity of the will at the time of the execution of the codicil. The same rule was applied in the case of *In re Knapp's Will*, 23 N. Y. Supp. 282, where a duly executed codicil ratified and confirmed a revoked will, and the court held that this was a sufficient republication to revive the former will, which had not been destroyed but simply revoked. A codicil, in order to revive a will, need not be physically annexed to it if the reference to the republished will is clear: *Harvey v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Van Cort-*

landt v. Kip, 1 Hill, 590. In England and in Ontario, by virtue of statutes relating to wills, a revoked will is not revived by a mere reference in the codicil to such will. The intention to revive the otherwise destroyed will must be clear, and this intention must appear on the face of the codicil: See Goods of Steele, L. R. 1 Pro. & D. 575; Macdowell v. Purcell, 23 Can. Sup. 101. A simple reference in the codicil to the date of the revoked will is not in itself sufficient; there must be other words to indicate the intention to revive the will: McLeod v. McNab, [1891] App. Cas. 471.

Olographic Wills.—The only cases we have found which treat of the revival of olographic wills arose in North Carolina. The statutes of this state require re-execution of a will or the due execution of a codicil in order to revive a revoked will. The question whether the same provision would apply to an olographic will was a matter of doubt until the case of Sawyer v. Sawyer, 7 Jones, 134. Prior to this it was treated as doubtful whether such a will could be revived by oral declarations or not: See Love v. Johnston, 12 Ired. 355; Battle v. Speight, 9 Ired. 288. The question was decided in Sawyer v. Sawyer, 7 Jones, 134, and the court held that all the requirements of the statute necessary to an original publication of the will must be complied with in order to constitute a valid republication. This would appear to be the most obvious rule everywhere. The question might arise as to what the testator must do in order to revive a revoked will of this character, if the original will is still in existence in the testator's handwriting and signed by him. If we take the California statute relating to olographic wills as an example, we find that three things are essential to the validity of such a will: (1) It must be written by the testator, (2) signed by him, and (3) dated by him. Now, in the case we have suggested above the first two of these requisites are present, the will written and signed by the testator. To require a rewriting and a re-signing would seem to be an idle ceremony, of which no one but the testator would have any knowledge. The date, however, is an essential part of the will, and this must be changed in order to make it speak from the date of its republication. The whole matter was stated clearly by the court in Sawyer v. Sawyer, 7 Jones, 134: "A subsisting olographic will cannot be republished, much less can a revoked olographic will be revived and republished by verbal declarations, however explicit and earnest. If an attested devise cannot be republished, or be revived and republished, except by a written instrument, attested in the manner required by the statute of frauds, in regard to the execution and revocation of devises, it follows by precise analogy that an olographic will cannot be republished, or revived and republished, except by a written instrument attested as required by the statute of frauds, or by an olograph, verified in the manner required by our statute in regard to the execution and revocation of such wills. So our conclusion is, that an olographic will revoked by the marriage of the testator can

only be revived and republished by a written instrument setting forth his intention, duly attested by two witnesses, or written by the testator himself, and found among his valuable papers, or handed to one for safekeeping; as if he makes an entry to that effect on the olograph, or strikes out the date and inserts a new one, or adds a codicil and puts the paper back among his valuable papers, or deposits it for safekeeping, so as to meet all the requirements of the statute."

McCLURE v. LAW.

[161 NEW YORK, 78.]

CORPORATIONS—DIRECTORS AS TRUSTEES—MONEY ACQUIRED BY VIRTUE OF OFFICE.—Where the president and director of a life insurance company is paid money by outside parties upon the condition that he procure the election of such outside parties as directors of the corporation and that they be given the control and management, with the property, of the corporation, such money is received by virtue of his office and from official acts, and he must account to the corporation for it.

CORPORATIONS.—WHERE MONEY IS ACQUIRED BY A PRESIDENT and director of a life insurance company by virtue of his official acts, he must account for the same, and it is no defense that his acts were illegal and unauthorized.

CORPORATIONS—DIRECTORS AS TRUSTEES—DEFENSE.—Where the president and director of a corporation receives money for the transfer of the control of the corporation to other parties, it is no defense that such transaction was for the purpose of reimbursing himself and other directors for moneys which they had invested in the purchase of promissory notes issued by the corporation, when such notes were not legally collectible from it.

David McClure, for the appellant.

Henry D. Hotchkiss, for the respondent.

⁷⁹ **HAIGHT, J.** This action was brought to recover of the defendant, a former president and director of the Life Union, the sum of three thousand dollars, which the plaintiff claims was profits made by the defendant out of his trust relationship with the company. The facts established by the evidence are, in substance, as follows: An agreement was entered into on the twenty-eighth day of December, 1891, between one Horace Moody, party of the first part, and Lucius O. Robertson and Lewis P. Levy, parties of the second part, by which the party of the first part undertook to deliver to the parties of the second part the absolute control and management of the Life

Union Association in consideration of the sum of fifteen thousand dollars. This was to be accomplished by the resignation, from time to time, of one or more ⁸⁰ directors of the corporation and the election of the parties of the second part, or the persons that they should designate, as directors. This agreement was entered into by Moody under the directions of the defendant, for whom he was acting as agent and attorney. It was modified on the fifth day of February, 1892, with reference to details in payments, etc., but not in any respect affecting the question here presented. These agreements were subsequently executed. Mr. Levy was elected a director to fill a vacancy theretofore existing, and then the defendant resigned as president and had Mr. Levy elected in his place. Subsequently, the defendant with other directors from time to time resigned, and their places were filled by persons designated by Levy. The money was paid over to a person designated by the defendant and then was distributed among the directors, the defendant receiving three thousand dollars. His excuse for this proceeding was that this transfer was made for the purpose of reimbursing himself and other directors for moneys that they had theretofore invested in the purchase of promissory notes which had been issued by the corporation for the purpose of purchasing the property and assets of the Flour City Life Association of Rochester. The notes, however, were by their terms payable out of the expense funds to be derived from the transfer membership of the Flour City Association, and, inasmuch as the transfer was never effected, the notes were not collectible from the Life Union: *McClure v. Levy*, 147 N. Y. 215. The defendant held three of these notes of one thousand dollars each, but they cannot be accepted as a justification of the transaction, or be received as a defense to this action. The question is therefore presented, whether the defendant is bound to account for the money received from Levy for the transfer to him and his associates of the management and control of the Life Union, together with its property and effects. The learned appellate division has treated this transaction as a bribe paid to the directors of the Life Union by Levy, and reached the conclusion that the money did not belong to the corporation. We think, however, that the law does not permit ⁸¹ the defendant to avail himself of his own wrong as a defense to this action. As president and director of the Life Union he was bound to account to that association for all moneys that came into his hands by virtue of his official acts, and he cannot be permitted

to shield himself from such liability under the claim that his acts were illegal and unauthorized. As an officer he had the right to resign, but the money was not paid to him for his resignation. It was paid over upon condition that he procure Levy and his friends to be elected directors and given the control and management, together with the property and effects of the corporation. The election of directors and the transfer of the management and property of the corporation were official acts, and whatever money he received from such official acts were moneys derived by virtue of his office for which we think he should account.

In *Sugden v. Crossland*, 3 Smale & G. 192, Horsefield was a trustee under a will. Crossland paid him seventy-five pounds to withdraw from the trust and have Crossland appointed in his place. It was held that the seventy-five pounds belonged to the estate.

Perry on Trusts, at section 427, says: "Trustees hold a position of trust and confidence, the legal title to the trust property is in them, and generally its whole management and control is in their hands. . . . They cannot use the trust property nor their relation to it for their own personal advantage. All the power and the influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners and not for the personal gain and emoluments of the trustees. . . . So, where a trustee retired from the office in consideration that his successor paid him a sum of money, it was held that the money so paid must be treated as a part of the trust estate, and that the trustee must account for it as he could make no profit directly or indirectly from the trust property or from the position or office of trustee."

In *Cook on Corporations*, section 650, it is said: "It is a well-established principle of law that a director commits a ⁸² breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him": See, also, *Chandler v. Bacon*, 30 Fed. Rep. 538; *Rutland etc. Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904; *Farmers' etc. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Sheridan v. Sheridan etc. Light Co.*, 38 Hun, 396.

The order of the appellate division should be reversed and

judgment entered on the verdict affirmed, with costs in all courts.

All concur, except Parker, C. J., not sitting, and Bartlett, J., dissenting.

CORPORATIONS—COMPELLING OFFICERS TO ACCOUNT. An officer of a corporation, who in making a contract for it secretly and fraudulently makes an arrangement by which he and two other directors in the corporation are to receive a commission out of the transaction, is liable to the corporation for all commissions so arranged for and received: *Rutland Electric Light Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904. See, too, *Bird Coal etc. Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727. And a director of a bank who loans its money on a note running to it at a stipulated rate of interest, but on a secret agreement with the borrower that he shall participate in the profits of lands to be purchased with the money, is bound to surrender those profits to the bank: *Farmers' etc. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62.

WADSWORTH *v.* MURRAY.

[161 NEW YORK, 274.]

WILLS—RULES OF CONSTRUCTION.—When a testator employs language that is clear, definite, and incapable of any other meaning than that which is conveyed by the words used, there is no reason for resorting to the rules of construction invoked in the case of ambiguous wills.

WILLS—HEIRS—TIME WHEN ASCERTAINED.—Where a testator leaves property in trust to one for life, and if he dies without leaving issue, the entire and absolute estate to descend to, and vest in, the testator's heirs at law in the same manner that it would have descended to and vested in them if the will had not been made, the heirs are to be ascertained as of the date of the testator's death.

WILLS—WHEN HEIR NOT EXCLUDED.—The fact that a testator by his will leaves property in trust for the benefit of one during life, and if such a one dies without issue the absolute estate to descend as if the will had never been made, does not show an intent in the testator to cut off such a one from receiving any portion of his estate, and will not prevent him from taking, as heir of the testator's daughter, a share of her interest in the remainder which the will vested in her.

WILLS—INTENT TO DISINHERIT GRANDCHILD.—The supposition that a testator did not intend to disinherit the child of his only surviving daughter will not prevent the exclusion of such child, when he is an alien, since the testator could not have anticipated that his daughter, who, at the time of his death, was unmarried and a member of his household, would marry an alien, and thus bring into the settlement of the estate the question of alien issue.

WILLS—PROCEEDS OF SALE OF LAND, WHETHER PERSONALTY OR REALTY.—Where real property is devised in trust, and the trustees are authorized to sell the same and reinvest the proceeds, the fact that the will provides that the trustees shall hold the proceeds, and that they shall be disposed of in the same manner as if the real estate had not been sold, does not impress such proceeds with the character of real estate for the purpose of determining the effect of a will of the testator's son, since such provision in the testator's will merely shows the intention that the sales should not vary the ultimate disposition which the will had made of the corpus of the trust.

JUDGMENT—EFFECT OF, ON VALIDITY OF DEED.—A judgment which declares that by a deed the grantees of the assignee of an insolvent debtor became the owners of certain property is conclusive, as against the contention that the deed was void for uncertainty in describing the property conveyed by it.

Treadwell Cleveland and William V. Rowe, for the appellant Charles J. Murray.

J. B. Adamas, for the appellants Charles F. and Mary W. Wadsworth.

Edward P. Coyne, for the appellants James W. Wadsworth et al.

John G. Milburn, for the respondent William A. Wadsworth.

James Breck Perkins, for the respondent, Herbert Wadsworth.

John R. Strang, respondent in person, and for the respondents James S. Wadsworth et al.

John L. Cadwallader, for the respondents William S. Dexter, executor, et al., trustees.

Lewis C. O'Connor, for the guardian ad litem of infants, respondents.

²⁸¹ **BARTLETT, J.** This case is brought before the court by three separate appeals. The first is taken by the defendant Charles James Murray, who, as the alien grandson of the testator, claims his mother's share in the property embraced within what is known as the "Brimmer trust," under the will of his grandfather, James Wadsworth, deceased. ²⁸² The other two appeals refer to a different question and will be considered later.

James Wadsworth, of Geneseo, in the county of Livingston, died on the sixth day of June, 1844, being the owner at the time of his death of a very large estate, consisting of real

estate and personal property, and leaving a last will and testament; he left him surviving two sons, James S. and William W., a daughter, Elizabeth, and a grandson, Martin Brimmer, Jr., the only issue of his deceased daughter Harriet.

The will gave to the testator's two sons each one-quarter of the estate, both real and personal. It also created two trust estates, each consisting of one-quarter of the estate, real and personal. One of these trusts was in favor of testator's daughter Elizabeth, and the other for the benefit of Martin Brimmer, Jr., his grandson.

The trustees designated to execute these trusts were Martin Brimmer, the son in law, and James S. Wadsworth, and William W. Wadsworth, the sons of the testator.

Martin Brimmer, Jr., was entitled to the rents, profits, and income of the real estate embraced in the trust for his benefit during his natural life.

The disposition of the real estate and its proceeds in the trust after the death of Martin Brimmer, Jr., was as follows: "And in case the said Martin Brimmer, Jr., shall die leaving lawful issue him surviving, such issue shall take an estate in fee in the real estate hereby devised in trust for him, and the entire and absolute estate and interest in such accumulations as are hereinbefore provided for. And in case the said Martin Brimmer, Jr., shall die, leaving no lawful issue him surviving, then, and in that case, the estate in said lands, and the entire and absolute estate and interest in such accumulations, shall descend to and vest in my heirs at law in the same manner that it would have descended to and vested in them if this will had not been made, and the said Martin Brimmer, Jr., had died without issue before my decease." The personal property embraced in this trust vested in the beneficiary on his attaining the age of twenty-one years.

²⁸³ At the time of testator's death in 1844, his grandson, Martin Brimmer, Jr., was a minor, and his daughter Elizabeth was unmarried. Elizabeth, in 1850, married Charles Augustus Murray, a subject of Great Britain, and died intestate in 1851, leaving her surviving an only son, Charles James Murray, one of the defendants, who is an alien, and one of the appellants here. Martin Brimmer, Jr., survived until January, 1896, a period of fifty-two years after the death of testator.

The first important question in this case is to determine who are the heirs at law referred to by the testator as being

the remaindermen entitled to the real estate embraced in this trust upon the death of Martin Brimmer, Jr., the life tenant.

It is insisted on the part of the respondents that the language already quoted from the Brimmer trust is clear, accurate, and needs no construction; that the heirs at law designated were those who answered that description at the time of testator's death.

On behalf of the appellant Charles James Murray, it is urged that he is entitled, as devisee, to one-third of the property held in trust for the benefit of Martin Brimmer, Jr., during his lifetime, he being one of the class of persons designated as heirs at law of testator. In other words, that the heirs at law of the testator are to be ascertained as of the time of the death of Martin Brimmer, Jr., and that Charles James Murray takes the entire share of his deceased mother, Elizabeth, the daughter of testator.

The appellant starts out with the proposition that, there being no specific intent expressed, the court must apply the settled rules of construction, and construe the will in accordance with the dictates of reason and justice, imputing to the language of testator such a meaning as, under all the circumstances, will conform to his probable intention.

We are of opinion that no such situation is presented; the language of the will is clear and the meaning of the testator very obvious. When he states that if Martin Brimmer, Jr., dies without issue the property "shall descend to and vest in ²⁸⁴ my heirs at law in the same manner that it would have descended to and vested in them if this will had not been made and the said Martin Brimmer, Jr., had died without issue before my decease," there is no reason for misapprehending the precise meaning of the testator. If Martin Brimmer, Jr., had died before the testator in 1844, and the latter had made no will, it is clear that his only heirs at law in that situation would have been his two sons, James S. and William W., and his daughter Elizabeth.

When the testator employs language that is clear, definite, and incapable of any other meaning than that which is conveyed by the words used, there is no reason for resorting to the rules of construction that are invoked in the case of ambiguous wills.

The counsel for the respondents have cited many cases in England, in this state, and other states which follow the well-settled general rule that where, on the termination of a life

estate, a remainder is limited to the heirs of the testator, the will is deemed to speak as of the time of his death, and his heirs at that time take a vested remainder. We are of opinion that there is no occasion to resort to this rule, and we place our decision on the intention of the testator, manifested by language that requires no construction.

It therefore follows that upon the death of the testator the remainder under the Brimmer trust vested in the testator's two sons and one daughter, subject to being divested if Martin Brimmer, Jr., died leaving issue.

This vested estate was descendible, devisable, and alienable: 1 Rev. Stats., sec. 35, p. 725.

The daughter, Elizabeth Murray, was therefore seised of one-third of the estate in remainder at the time of her death in 1851, seven years after her father's decease, and it descended to her brothers, James S. and William W., and to her nephew, Martin Brimmer, Jr., the son of her deceased sister, Harriet, as her own son was an alien and could not, at that time, take by descent.

The appellants argue that by the provisions of James Wadsworth's ²⁸⁵ will his intention was clear to cut off Martin Brimmer, Jr., from receiving any portion of his estate. We regard those provisions as simply a declaration by the testator that his heirs at law at the time of his death were to become seised of the contingent estate in remainder under this trust and ultimately of an absolute estate if Martin Brimmer, Jr., died without issue. It was in no sense an exclusion of Martin Brimmer, Jr., from any share in testator's estate as an heir at law of his aunt Elizabeth.

It is also urged by the appellants that the testator did not intend to disinherit the child of his only surviving daughter. The obvious answer to this suggestion is that the testator could not have anticipated that his daughter, who, at the time of his death, was unmarried and a member of his household, would marry an Englishman and thus bring into the settlement of his estate the question of alien issue.

We have carefully considered the able and learned briefs submitted on behalf of the appellant Charles James Murray, but our reading of the will of James Wadsworth renders it unnecessary, as before stated, to deal with those questions resting upon the assumption that there is no specific intention of the testator expressed in the instrument.

We agree with the learned appellate division that the appel-

lant Charles James Murray is entitled to no interest in the property held in trust under the will of James Wadsworth, deceased.

The further questions in this case arise on two separate appeals, one taken by Charles F. Wadsworth, and his only living issue, Mary W. Wadsworth (now Chandler), and the other by the defendants James W. Wadsworth and others, as trustees of the "sons' trusts" under the will of James S. Wadsworth, deceased.

These appeals involve the disposition to be made of the proceeds of sales of real estate made from time to time by the trustees of the trust in which Martin Brimmer, Jr., was beneficiary under the will of his grandfather, James Wadsworth.

It appears by the report of the referee, who was appointed ²⁸⁶ to state the accounts of this trust as of the time of the death of the beneficiary on the 14th day of January, 1896, that the real estate amounted to \$409,312.90, and the personal property to \$374,473.85.

It is admitted that of this personalty \$3,378.31 was derived from the sale of lands in Monroe and Livingston counties, between the year 1855 and the death of James S. Wadsworth, and that \$62,889.04 was realized from the sale of similar lands after the death of James S. Wadsworth. The distribution of these two amounts is involved in this action.

The trustees under the Brimmer trust were authorized "to sell and dispose of all or any part of the said real estate herein devised to them in trust, . . . and to invest the proceeds in the same manner that they are hereinbefore authorized to invest the proceeds of the real estate conveyed to them in trust for my daughter Elizabeth, to be held by them upon the same trusts and to descend, go and be disposed of in the same manner that the same would have been held, descended, gone, and been disposed of if the said real estate had not been so sold."

The manner in which the proceeds of the sale of real estate were authorized to be invested under the trust for testator's daughter Elizabeth was as follows: "To invest the proceeds of such sale or sales in other lands lying in the state of New York, or to invest them in the state stocks of this state, or of the United States, or in bonds secured by mortgages upon real estate lying in this state, or to invest such proceeds in part in such lands, in part in such stocks, and in part in such bonds secured by mortgages, the amount to be invested in each to be at the discretion of such trustees."

If the proceeds of sale are to be regarded as real estate, they will, as the appellants claim, constitute a portion of the "sons' trusts" under James S. Wadsworth's will. And if they are personal property, as the respondent insists, they will pass under the provisions of said will disposing of the testator's personal property, which would be one-half absolutely to his sons and the other half as part of the corpus of the "daughter's trust."

287 The foundation of the argument advanced by the appellants, to the effect that the proceeds of these real estate sales are to be regarded as real estate for all purposes, rests on that provision of James Wadsworth's will dealing with the proceeds of sales that he had authorized, to the effect that they were "to be held by them upon the same trusts, and to descend, go, and be disposed of in the same manner that the same would have been held, descended, gone, and been disposed of if the said real estate had not been so sold."

The contention is that this provision affixes to these proceeds the fictitious character of realty until they are finally distributed at the termination of the Brimmer trust.

The will of James Wadsworth was admitted to probate in 1844, and for fifty-two years the investment and reinvestment of the trust was conducted by the trustees under its provisions.

The reference that the testator made in defining the powers of these trustees under the trust he had created in favor of his daughter Elizabeth shows conclusively that he did not intend to treat the proceeds of real estate sales as realty, but, on the contrary, vested his trustees with the most ample powers as to the manner in which the moneys should be invested.

The particular clause relied upon, and above quoted, must be read in connection with this authority, bestowed upon the trustees as to investments.

When the testator stated that notwithstanding these changes of investments his estate should descend, go, and be disposed of as if there had been no sales, he was simply impressing the fact upon those who should come after him that he did not intend to vary the ultimate disposition he had made of the corpus of the Brimmer trust. He had provided that it should "descend to and vest in my heirs at law in the same manner as it would have descended to and vested in them if this will had not been made and the said Martin Brimmer, Jr., had died without issue before my decease." In other words, the principal of the trust must go in one of two ways,

either to Brimmer's issue or to testator's heirs existing at the time of his death.

²⁸⁸ The clause so relied upon by the appellants is given full force and effect by securing the above result, and to hold that James Wadsworth intended to follow the vested remainders after they had passed to his heirs at law seems a strained and unnatural construction, and inconsistent with the ample discretion with which the trustees were clothed as to reinvestments.

We are of opinion that a proper construction of the will of James Wadsworth leads to the conclusion that the proceeds of real estate sales involved in this action are personal property and pass under James S. Wadsworth's will as such.

The remaining question is as to whether the executors and trustees of Martin Brimmer's estate and the representatives of Craig Wadsworth's children are entitled to all the property which comes to Charles F. Wadsworth from his father, James S. Wadsworth, deceased.

It may be noted here that Charles F. Wadsworth died in November, 1899, a few days before the argument in this court, and his widow, as executrix of his will, stands in his place upon the record.

In 1872, Charles F. Wadsworth was adjudged a bankrupt, and his interests in his father's estate were transferred by Frederick Buell, the grantee of his assignee in bankruptcy, to James W. Wadsworth individually and Martin Brimmer individually, the last-named two individuals and Charles F. Wadsworth being the executors and trustees under the will of James S. Wadsworth, deceased.

In an action in the supreme court, Livingston county, for an accounting, in which Martin Brimmer individually and as executor of and trustee under the last will and testament of James S. Wadsworth is plaintiff, and Charles F. Wadsworth and others were defendants, and in which judgment was entered on the 25th of June, 1887, it was adjudged "that by deed bearing date the twenty-sixth day of December, 1873, made by Frederick Buell to the said defendant James W. Wadsworth and said plaintiff, Martin Brimmer, mentioned in said report, the said James W. Wadsworth and Martin Brimmer became and have since been and now are the owners of and entitled ²⁸⁹ in their own right to all the right, share, and interest of the defendant Charles W. Wadsworth of, in, and to the estate and property, real and personal, of the said James S. Wadsworth, deceased."

By this judgment Martin Brimmer also recovered three money judgments against Charles F. Wadsworth, aggregating \$138,414.26, and Hezekiah Allen, as sole surviving executor of the estate of Craig Wadsworth, deceased, recovered like judgments; these judgments aggregate in principal \$276,828.52 and interest due thereon from May 1, 1896, according to the report of the referee.

These judgments were recovered against Charles F. Wadsworth by his coexecutors and trustees under his father's will to compel him to make good to them losses sustained by his father's estate for which he was liable. Mary W. Wadsworth (now Chandler) was a party to this action.

Counsel for Charles F. Wadsworth now insists that the deed from his assignee in bankruptcy to Buell is void for uncertainty in describing the property conveyed by it, as "all the interest that the said Charles F. Wadsworth had on the ninth day of July, 1872, in the estate of his father, James S. Wadsworth, the same being the undivided one-sixth part thereof."

The answer to this contention is, that the effect of this deed has been adjudicated, as before stated, and the judgment is binding on Charles F. Wadsworth and Mary W. Wadsworth. Furthermore, if the deed were void, it would not benefit Charles F. Wadsworth, but would place title in his assignee in bankruptcy.

In *Chautauque County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442, it was held that an assignment to a receiver of all the debtor's real and personal estate conveyed his lands in this state without any specific description of them: See, also, *Sanders v. Townshend*, 89 N. Y. 623.

The judgment is, however, conclusive in this action, as it was before the special term judge when he decided this case and also handed up on the argument in this court.

²⁹⁰ We thus reach the conclusion that the interest of Charles F. Wadsworth in the estate of his father, James S. Wadsworth, has been effectually disposed of as found by the court below.

The judgment appealed from should be affirmed, with costs.

All concur.

WILLS.—CONSTRUCTION and interpretation should not be resorted to where the intention of the testator is clothed in unequivocal expressions: *Theall v. Theall*, 7 La. 226, 26 Am. Dec. 501.

WILLS—HEIRS, WHEN TO BE ASCERTAINED.—Where a tes-
AM. ST. REP., VOL. LXXVI.—18

tator by his will gives his property to his sister during her life, and "at her decease said estate to be distributed amongst my lawful heirs," the words "lawful heirs" have reference to the lawful heirs of the testator at the time of his death: *In re Tucker's Will*, 63 Vt. 104, 25 Am. St. Rep. 743. See, on this subject, the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 416-430.

EQUITABLE CONVERSION DOES NOT OCCUR UNLESS there is an imperative direction in the will that land shall be converted into money or money into land: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135. The testator's intention is the determining factor as to whether conversion should take place: See the monographic note to *Ford v. Ford*, 5 Am. St. Rep. 142, discussing equitable conversion.

ON THE CONCLUSIVENESS OF JUDGMENTS, see the monographic notes to *Gould v. Sternburg*, 15 Am. St. Rep. 142-144; *Lea v. Lea*, 96 Am. Dec. 775-788.

SULLIVAN v. DUNHAM.

[161 NEW YORK, 290.]

REAL PROPERTY.—THE USE OF LAND by the proprietor is not an absolute right, but is qualified and limited by the higher right of others to the lawful possession of their property.

REAL PROPERTY—BLASTING ON—LIABILITY FOR.—One who for a lawful purpose and without negligence or want of skill explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable for the injury thus inflicted as a trespasser.

REAL PROPERTY—BLASTING ON—CONSEQUENTIAL INJURY.—Where one who is engaged in a lawful act explodes a blast upon his own land which causes injury to his neighbor, but such injury is consequential and not direct, there being no technical trespass, there is no liability in the absence of negligence.

APPEAL.—NO OBJECTION can be considered on appeal, unless it was taken upon the trial and saved by an exception.

Annie E. Harten, the plaintiff's intestate, while traveling on a public highway, was killed by a blow from a section of a tree which fell upon her, after it had been hurled more than four hundred feet by a blast. The defendants, Dinkel and Jewell, were employed by the defendant Dunham, the owner of a tract of rough land, to blast out certain trees standing upon it. The tree in question was three hundred feet from the highway, from sixty to seventy feet high, and between it and the highway was woodland. Dynamite was placed under the tree and exploded, a section of the stump being thrown over the intervening forest, four hundred and twelve feet, to the highway, striking the intestate, who died within a few hours. Judgment for the plaintiff. Defendants appeal.

Isaac N. Mills, for the appellants.

Sumner B. Stiles and Francis L. Wellman, for the respondent.

202 VANN, J. The main question presented by this appeal is whether one who, for a lawful purpose and without negligence or want of skill, explodes a blast upon his own land and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable for the injury thus inflicted.

The statute authorizes the personal representative of a decedent to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's **293** death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued": Code Civ. Proc., sec. 1902. It covers any action of trespass upon the person which the deceased could have maintained if she had survived the accident. Stated in another form, therefore, the question before us is whether the defendants are liable as trespassers.

This is not a new question, for it has been considered, directly or indirectly, so many times by this court that a reference to the earlier authorities is unnecessary. In the leading case upon the subject, the defendant, in order to dig a canal authorized by its charter, necessarily blasted out rocks from its own land with gunpowder, and thus threw fragments against the plaintiff's house, which stood upon the adjoining premises. Although there was no proof of negligence, or want of skill, the defendant was held liable for the injury sustained. All the judges concurred in the opinion of Gardiner, J., who said: "The defendants had the right to dig the canal. The plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose on the exercise of reasonable

care, demolish his house, and thus deprive him of all use of his property. The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives ²⁹⁴ of the aggressor. . . . He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner": *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279.

This case was followed immediately by *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284, a similar action against the same defendant, which offered to show upon the trial "that the work was done in the best and most careful manner." It was held that the evidence was properly excluded because the manner in which the defendant performed its work was of no consequence, as what it did to the plaintiff's injury was the sole question.

These were cases of trespass upon lands, while the case before us involves trespass upon the person of a human being, when she was where she had the same right to protection from injury as if she had been walking upon her own land. As the safety of the person is more sacred than the safety of property, the cases cited should govern our decision unless they are no longer the law.

The *Hay* case was reviewed by the commission of appeals in *Losee v. Buchanan*, 51 N. Y. 476, 479, 10 Am. Rep. 623, where it was held that one who, without negligence and with due care and skill, operates a steam boiler upon his own premises, is not liable to his neighbor for the damages caused by the explosion thereof. That was not a case of intentional, but of accidental, explosion. A tremendous force escaped, so to speak, from the owner, but was not voluntarily set free. The court, commenting upon the *Hay* case, said: "It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was ²⁹⁵ the necessary consequence of just what the defendant was

doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land."

The Hay case was expressly approved and made the basis of judgment in *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258, where a blast, set off by a contractor with the state in the enlargement of the Erie canal, threw a piece of frozen earth against the plaintiff when he was at work upon the adjoining premises for the owner thereof. In holding the contractor liable the court said: "Even if it should be conceded that the defendant had the right, from being a contractor with the state, to do all that which the state might do, in the progress of the work, I do not think that this would justify him, in the state of facts which this case presents, in casting material upon the premises of a private owner, upon which the plaintiff was lawfully engaged. The state could not intrude upon the lawful possession of a citizen, save in accordance with law. Unless authorized by law so to do, the casting of a stone from the bed of the canal upon the land of an adjoining proprietor, either by the state or an individual, was a trespass: *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279. . . . Nor can the defendant protect himself from liability, for that his act of blasting out the rock with gunpowder was necessary; and hence that the effects of it upon the adjacent premises were an unavoidable result of a necessary act. The case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, shows that unless there is a right to the use of the adjacent lands for the purposes of the work, it matters not that the mode adopted of carrying on the work was necessary. . . . It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or no he made his invasion without negligence: *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72."

This case is analogous to the one before us, because the person injured did not own the land upon which he stood when struck, but he had a right to stand there the same as the ²⁹⁶ plaintiff's intestate had a right to walk in the highway. We see no distinction in principle between the two cases.

In *Mairs v. Manhattan Real Estate Assn.*, 89 N. Y. 498, 505, the defendant was held liable without proof of negligence for making an excavation upon his own land, through which, during a heavy rain, water found its way into the cellar of the

adjoining owner, although the excavation was made under a license from the municipal authorities. Rapallo, J., speaking for all the judges, said: "The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258, and *Jutte v. Hughes*, 67 N. Y. 267, in which it is held that where one is making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases."

When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability in the absence of negligence. Thus in *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, a contractor with the United States government, in doing work required by his contract, injured property by concussion only and without casting any material upon the premises of the plaintiff. It was held that there could be no recovery without proof of negligence. The second division of this court in deciding that case said: "This is not a case of taking private property, or of direct, but is of consequential, injury. The plaintiff's house was three thousand feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances ²⁹⁷ upon them, as in *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284, and *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258, and hence no going outside of the authority actually conferred and conferrable as in those cases. . . . One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless."

The facts were similar in *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, where it was "not claimed that

any rock or materials were thrown by the blasts upon the plaintiff's lot." While it did not appear in what particular way the injury was produced, it was inferred "that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined." It ~~was~~ held that the charge of the trial judge, that "it made no difference whether the work was done carefully or negligently," was erroneous, and the judgment was reversed for that reason. All the judges concurred in saying: "We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. . . . The defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It ²⁰⁸ was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. . . . The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances we think the plaintiff has no legal ground of complaint."

The *Hay* case has been repeatedly cited by this court, but has never been overruled or even criticised, so far as we have discovered: *Radcliff v. Mayor*, 4 N. Y. 195, 199, 53 Am. Dec. 357; *Pixley v. Clark*, 35 N. Y. 520, 523, 91 Am. Dec. 72; *Jutte v. Hughes*, 67 N. Y. 267, 273; *Heeg v. Licht*, 80 N. Y. 579, 583, 36 Am. Rep. 654; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 26. It has been several times distinguished from

cases to which it clearly did not apply, such as that class where the injury was not direct but consequential, of which illustrations have already been given. It has also been distinguished, if that word may be used to point out differences between cases which rest upon wholly different principles, in that line of authorities which hold that where the work is not bound to produce injury and is done wholly by an independent contractor, with no control by the owner, the former only is liable. We cite, as an example of this class, *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267, where it was held that the defendant was not chargeable with the negligent acts of another in doing work upon his lands unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. It is said in the prevailing opinion that "the case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, is not an authority, and has never been regarded as an authority upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants, and the only question ²⁹⁹ considered in the court of appeals was, whether the defendants could be made liable without the proof of negligence."

Pack v. New York, 8 N. Y. 222, *Kelly v. New York*, 11 N. Y. 432, *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348, *Roemer v. Striker*, 142 N. Y. 134, *French v. Vix*, 143 N. Y. 90, and *Berg v. Parsons*, 156 N. Y. 109, 66 Am. St. Rep. 542, were of like character, and turned upon the liability of an independent contractor, as distinguished from that of the owner, and in some of them also the injuries were indirect and consequential, having been caused by concussion or vibration. *Driscoll v. Newark etc. Co.*, 37 N. Y. 637, 97 Am. Dec. 761, was tried and decided on the theory of negligence, and as the recovery was simply sustained on that ground, without considering the subject of trespass, which, for some reason, was kept out of the case, it has no bearing upon the question before us.

Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322, is also relied upon by the appellants. In that case the plaintiff's grantor had purchased a house standing over a mine, which, with the right to work it, had been reserved. It was held that the plaintiff could not enjoin his grantor from blast-

ing in the mine at night, so as to disturb those sleeping in the house. The Hay case was distinguished, because the plaintiff therein "had the right of undisturbed possession of his property," whereas in the Marvin case his right was subject to that of the defendant to work its mine in the usual way, which was the sole use it could make of its property, and to which use the plaintiff, through his grantor, had expressly assented. When there is a conflict of rights public policy requires one to give up the right of a particular use rather than permit him by such use to destroy his neighbor's property altogether. In the case cited, however, the particular use was the only one possible, and the right to that use was imposed as "a serious servitude" upon the surface land, which was all that belonged to the plaintiff.

We think that the Hay case has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the state upon the subject, it should ³⁰⁰ not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer by tending to prevent a land owner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be. It so applies the maxim of *sic utere tuo* as to protect person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury. The accident in question was a misfortune to the defendants, but it was a greater misfortune to the young woman who was killed. The safety of travelers upon the public highway is more important to the state than the improvement of one piece of property, by a special method, is to its owner. As was said by the supreme court of Indiana, in following the Hay case: "The public travel must not be endangered to accommodate the private rights of individuals": *Wright v. Compton*, 53 Ind. 337.

We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a

public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree.

We find no reversible error in the record before us. While the complaint suggests negligence as the gravamen of the action, it was tried upon the theory of trespass, and no ruling was made, or exception taken, which raised any question as to the scope of the pleadings, or suggested the propriety of a motion for leave to amend. We can consider no objection unless it was taken upon the trial and saved by an exception: *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437. Moreover, if every allegation relating to negligence were struck ³⁰¹ from the complaint, it would still set forth a cause of action in trespass.

The question whether the defendants, Dinkel and Jewell, were independent contractors was settled by the jury, and after unanimous affirmance by the appellate division, is beyond our power of review: *Szuchy v. Hillside Coal etc. Co.*, 150 N. Y. 219. There is no exception relating to the admission of evidence, or to the charge of the court, which requires a reversal.

The judgment is right and should be affirmed, with costs.

All concur, except Gray, J., not voting.

THE OWNER OF PROPERTY HOLDS IT SUBJECT to the implied obligation that he will so use it as not to interfere with the rights of others: *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305. His right to make excavations thereon is subject to the limitation that he must not cast the soil, stones, etc., upon neighboring land to the annoyance or inconvenience of its owners: *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; and he is liable for injuries caused thereby irrespective of negligence: *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284.

BLASTING—LIABILITY FOR.—Persons using a powerful explosive in blasting are charged with the duty to adopt some means to protect persons placed in danger by the explosion of such blasts, and a failure to perform this duty is negligence for which they are liable in damages: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 32 Am. St. Rep. 786. As to the necessity of giving notice of intended blasts, see *Mitchell v. Prange*, 110 Mich. 78, 64 Am. St. Rep. 329, and note. Where one in carrying out a contract with the state to enlarge a public canal uses gunpowder in blasting rock and earth, and missiles are hurled against one at work on premises near the canal, the contractor is liable whether he is negligent or not: *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

SECOND NATIONAL BANK v. WESTON.

[161 NEW YORK, 520.]

PARTNERSHIP—AUTHORITY OF ONE MEMBER TO SIGN ACCOMMODATION PAPER—QUESTION FOR JURY.—Where one partner uses the firm name constantly for years in signing accommodation paper, and his copartners simply remonstrate privately with him, there is evidence of acquiescence and ratification, and it is a question of fact for the jury as to the good faith of the copartners, and as to the implied authority of the other partner.

PARTNERSHIP—CONTINUANCE OF, AS TO THIRD PARTIES.—A partnership, with the authority of one member to bind his copartners, continues as to third persons, acting in good faith, who knew of the existence of the firm, but had no knowledge, actual or constructive, of its dissolution.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—ACCOMMODATION PAPER.—Where the payee of a promissory note transfers it for value, the purchaser has a right to assume that the relation of every party whose name had been written upon it was precisely what it appeared to be, and the fact that the names of other subsequent indorsers appear upon the note does not charge the purchaser with notice that it was executed by the maker for the payee's accommodation.

NEGOTIABLE INSTRUMENTS—NOTICE THAT NOTE IS ACCOMMODATION PAPER—QUESTION FOR JURY.—Evidence that the payee told the purchaser of a note that it was given him "to use in his matters," coupled with the statement that it was given on account of property transferred to the makers, does not conclusively establish notice to the purchaser that it was an accommodation note. The question as to what inference should be drawn from such evidence is for the jury.

NEGOTIABLE INSTRUMENTS—DUTY OF PURCHASER. The purchaser of negotiable paper, for value and before maturity, is not bound at his peril to be on the watch for facts which might put a cautious man on his guard.

TRIAL—WAIVER OF RIGHT TO GO TO JURY.—When both parties move for the direction of a verdict, they impliedly consent that the court shall decide every question of fact in the case, and thereby waive the right to go to the jury.

TRIAL—WAIVER OF RIGHT TO GO TO JURY.—A plaintiff does not waive his right to go to the jury where, while he at first seemingly acquiesces in the position that there was no question of fact, upon the defendant's moving for the direction of a verdict, yet, before the court has taken any action, and after a discussion of the evidence by the trial judge, requests that the entire case be submitted to the jury and excepts to the refusal of his request. Until final action was taken by the actual direction of a verdict, the plaintiff's counsel could change his mind and ask to go to the jury.

APPEAL—REQUEST TO GO TO JURY—WHEN SUFFICIENT.—A general request to submit the entire case to the jury is sufficient to save a party's rights upon the direction of a verdict for the adverse party, where neither the court nor counsel

for the adverse party raises any question as to what particular question of fact the party desired to have the jury pass upon.

APPEAL—EXCEPTION TO DIRECTION OF VERDICT—SUFFICIENCY.—A mere exception to the direction of a verdict is sufficient to present the question on appeal without requesting that any fact be submitted, in the absence of implied consent that the case be decided by the court.

Action upon a promissory note signed by "Weston Brothers" for three thousand nine hundred and twenty-five dollars and seventy-one cents, dated December 30, 1891, payable eighteen months after date to the order of George E. Ramsey. It was indorsed by the payee as first indorser. The firm of Weston Brothers had been in existence many years prior to January 3, 1892, when it was dissolved. No actual notice of dissolution was given to the plaintiff, and no constructive notice through the newspapers. The answer alleged that the firm name was fraudulently signed after the dissolution of the firm, for the accommodation of the payee. The court directed a verdict for the defendant.

C. S. Cary, for the appellant.

J. H. Waring, for the respondents.

524 VANN, J. The main questions presented by this appeal have already been passed upon by us in another case against the same defendants, but recently decided: *Bank of Monogahela Valley v. Weston*, 159 N. Y. 201. Upon a similar state of facts we then held that there was a question of fact for the jury as to the good faith of Abijah and Orren Weston in simply remonstrating privately with their brother William against his constant use, during many years, of the firm name for the accommodation of his friends, and as to his implied authority to do so. Our reasons for holding that the same question of fact is presented in this case may be found in our opinion rendered on the former appeal.

We further held that the copartnership of Weston Brothers and the authority of William to bind his associates by his acts, continued as to third persons, acting in good faith, who knew of the existence of the firm, but had no knowledge, either actual or constructive, of the dissolution thereof. That disposes of the same question presented in this case upon substantially the same facts.

There is one feature, however, which distinguishes this case from the others against these defendants that have been before

us: *Smith v. Weston*, 159 N. Y. 194; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201. The notes formerly under consideration were presented to the purchaser, either by the maker, or by a party who would not, in the ordinary course of business, have them in his possession unless they were accommodation paper. This fact, after evidence was given tending to show that the notes had been signed by William in the name of the firm without the consent of the other members, was held to involve such notice to the purchaser as to cast upon him the burden of showing that he was a bona fide purchaser, or that the use of the firm name by the one partner was authorized by his copartners. In the case now before us, the note was presented to the plaintiff by the payee, to whom it had apparently been delivered by the Weston Brothers, as makers, in the usual course of business, and hence, upon the face of the transaction, there was nothing to put the purchaser upon inquiry. ⁵²⁵ The plaintiff had a right to assume, in the absence of actual notice of any defect, that the relation to the paper of every party whose name had been written upon it was precisely what it appeared to be: *Cheever v. Pittsburgh etc. R. R. Co.*, 150 N. Y. 59, 55 Am. St. Rep. 646. While the plaintiff may have had notice that the subsequent indorsers, who do not defend, had indorsed for the accommodation of some other party to the note, the presentation of the note by the payee cast no suspicion upon the capacity in which the Weston Brothers had signed it. As to them, it was apparently business paper, and there was nothing for the plaintiff to inquire about in that regard.

The defendants, however, gave evidence tending to show that the note was in fact made outside of the business of the firm by William W. Weston without the authority of his copartners, and thereupon it became necessary for the plaintiff to show either that it was a bona fide purchaser or that the making of the note was authorized: *Smith v. Weston*, 159 N. Y. 194. In order to meet the burden of proof thus shifted upon it, the plaintiff proved that it purchased the note before maturity for value, and then called its president, who testified that he was the manager of its bank and had known of the existence of the firm of Weston Brothers and of their "good credit" for a great many years; that when the note in suit was presented by the payee, the president asked him what "this long time paper" meant, and was informed "that a deal had been made between the Westons and himself by which

this paper was secured to them, and it was given to him to use in his matters and he had it for that purpose. He did not say in express terms that it was business paper. He did not go into the details of it. He said to me the transaction was one by which property had been transferred to the Westons, and this paper was given back to him on account of it. That was the situation. There was nothing further said about it on that occasion."

This evidence did not conclusively establish notice to the plaintiff that the note was accommodation paper. While it may have permitted, it did not, as matter of law, require that **526** inference. The statement of Mr. Ramsey that the note was given to him "to use in his matters" should be read in connection with his further statement, made at the same time, that "property had been transferred to the Westons and this paper was given back to him on account of it." This permitted the inference that the note was business paper, given in the course of a business transaction. Where conflicting inferences may be drawn from undisputed testimony, a question of fact is presented for the jury. The purchaser of negotiable paper, for value and before maturity, is not bound at his peril to be on the watch for facts which might put a very cautious man on his guard. As we said in a late case: "He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honest and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail": *Cheever v. Pittsburgh etc. R. R. Co.*, 150 N. Y. 59, 66, 55 Am. St. Rep. 646.

It is, however, insisted that the plaintiff waived its right to have any question submitted to the jury by the course pursued at the trial.

At the close of the evidence the trial judge asked the counsel upon either side what there was to go to the jury, and each replied that he did not know. The judge then said that there was no conflict in the testimony, and that the question was whether the Westons gave such notice of the dissolution

as they should have given under all the circumstances, and he inquired, "That is about all there is of it, is it not?" Thereupon the counsel for the defendants asked the court to direct a verdict in their favor. The court then discussed the facts, and said he thought he ought to take the same course as had ⁵²⁷ been taken in certain other cases against the Weston Brothers, intimating that if he were to dispose of the matter as an original question he might make a different disposition. He alluded to the facts relating to the knowledge that "the Westons had of the use which was made of the firm name by W. W. Weston," and said: "There is no controversy as to the length of time that the knowledge had existed and the extent to which this name had been used." After making some remarks on the question of dissolution, he concluded: "I think I shall send it with the other cases, agreeing with Judge Spring, for the purpose of getting a decision." Before anything further was said or done, the counsel for the plaintiff asked to go to the jury upon the whole case, and excepted to the refusal of the court to allow him to do so. Thereupon a verdict was directed in favor of the defendants, and the plaintiff's exceptions were ordered to be heard in the first instance by the appellate division.

The principle upon which a directed verdict is sustained, even when there is a question of fact, is that the defeated party, expressly or impliedly, waived his right to go to the jury. In the case of an express waiver, there is no reason for caution on the part of the courts, but cases of implied waiver frequently involve such hardship and injustice that the rule should not be unduly extended. There is another reason for conservatism in this direction, and that is the verdict is usually directed without time for reflection, and with no intention on the part of the court to pass upon any question of fact, so that the rights of a party may be conclusively determined against him, unconsciously, by the trial judge, without exercising his judgment upon the facts. Mere convenience in transacting business by the court should not prevail over the administration of justice, which is the object for which courts are organized.

When both parties move for the direction of a verdict, they impliedly consent that the court shall decide every question of fact in the case, and thereby waive the right to go to the jury. As was said by Judge Andrews in *Thompson v. Simpson*, 128 N. Y. 270, 283: "The effect of a request by each

party for a direction of a verdict in his favor clothed the court with the functions of the jury, and it is well settled that in such case where the party whose request is denied does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands as would the finding of a jury."

In *Shultes v. Sickles*, 147 N. Y. 704, both parties asked the trial judge to direct a verdict, each in his own favor, and in reviewing the case the court said: "While it is true that in a case where both parties request the court to direct a verdict, the court is thereby clothed with the functions of the jury, with respect to any questions of fact in the case, and in the absence of a request to go to the jury by the party against whom the verdict is directed the decision stands in the place of a verdict, yet in this case the plaintiff, upon a denial of his motion, made the request to have the case submitted to the jury. He was not precluded from making this motion by his previous request to have a verdict directed in his favor, and, if there was any evidence competent to submit to the jury upon the disputed questions of fact, the denial of his motion would probably be error."

The plaintiff did not move for the direction of a verdict, although the defendants did, and it did not acquiesce in the proposed action of the court, but at once made the necessary request. Until final action was taken by the actual direction of a verdict, the plaintiff's counsel could change his mind and ask to go to the jury. While, at first, he led the court to believe there was no question of fact, afterward there was an intelligent discussion of the evidence by the trial judge which suggested reasons why the case should be submitted to the jury. The intimation of the trial judge that, but for the action taken in the other cases, he would either direct a verdict for the plaintiff or submit the case to the jury, doubtless indicated to counsel the propriety of making the request, which he at once made. The court was not misled, because the request was made before the verdict was directed, and the ⁵²⁰ defendants were not injured, because their legal rights were not affected. Under these circumstances it would be harsh and unjust to hold that the plaintiff waived a right, which it obviously did not intend to waive, and which the court knew it did not intend to waive. Waiver depends on intention, or misleading conduct, but how can there be a waiver with neither? While the trial judge is entitled to be fairly treated, so long as

the discussion is open and the court has not actually directed a verdict, the request to go to the jury is in time. A party is not estopped from claiming an important right by a mere intimation from the court of what he may do. Such a rule would be technical and arbitrary, and would not tend to promote justice. It would give a man his day in court and then take it away from him. It is not until the court has acted that the right of a party to act is lost. When the trial judge, in discussing the case, suggested a question of fact in relation to the authority of William Weston to sign accommodation paper in the name of his firm, and then intimated that his action would be merely formal by following the course of another judge, without exercising his own judgment, the circumstances were changed and the plaintiff's counsel could properly ask to go to the jury, even if what he had previously said would otherwise have amounted to a waiver. No question was raised by the court, or by the counsel for the defendants, as to what particular question of fact the plaintiff desired to have the jury pass upon, and the request as made was to have them pass upon the whole case. Under such circumstances it was not necessary for the plaintiff to name a particular question of fact any more than when a motion to nonsuit is granted: *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Clemence v. Auburn*, 66 N. Y. 334.

When a verdict is directed, an exception to the ruling, in the absence of implied consent that the case be decided by the court, is sufficient to present the question upon appeal without requesting that any fact be submitted: *Trustees etc. v. Kirk*, 68 N. Y. 459; *First Nat. Bank v. Dana*, 79 N. Y. 108, 116.

⁵³⁰ We think there were questions of fact for the jury, and that the court erred in directing a verdict after the plaintiff had requested that the whole case be submitted to them.

The judgment should be reversed and a new trial granted, with costs to abide event.

Parker, C. J., O'Brien, and Haight, JJ., concur.

Martin, J., concurs in result.

Gray and Bartlett, JJ., not voting.

ON THE AUTHORITY OF A PARTNER TO INDORSE ACCOMMODATION PAPER, see the monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 754-757.

PARTNERSHIP—EFFECT OF DISSOLUTION AS TO THIRD

AM. ST. REP., VOL. LXXVI.—19

PERSONS.—Those who had dealt with a firm before its dissolution are entitled to hold all the partners liable for debts contracted thereafter in good faith and in the belief that the firm still continued: See the extended note to *Gilmore v. Ham*, 40 Am. St. Rep. 573.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.—One to whom negotiable paper is presented for discount has the right to assume that the relations to the paper of every party whose name appears upon it are precisely what they appear to be; he is not bound at his peril to be alert for circumstances which may possibly excite suspicion: *Cheever v. Pittsburgh etc. R. R. Co.*, 150 N. Y. 59, 55 Am. St. Rep. 646. On bona fide ownership of negotiable instruments, see the extended notes to *Bedell v. Herring*, 11 Am. St. Rep. 309-326; *Sims v. Lyles*, 26 Am. Dec. 156-158.

TRIAL—WAIVER OF RIGHT TO SUBMIT TO JURY.—One who submits his case on a motion to direct judgment in his favor submits it both upon the facts and the law, and cannot afterward urge that there were questions of fact which should have gone to the jury: *Angler v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 685.

BOYER v. EAST.

[161 NEW YORK, 580.]

GUARDIAN AND WARD—PURCHASE OF PROPERTY BY SOCAGE GUARDIAN.—A mother of infants, who, upon the death of their father intestate, becomes their guardian in socage, and has the custody of the infants' interests in the real estate, and who has also a personal interest in the lands as dowress, can at a foreclosure sale protect her own interest and the common interest of herself and children by purchasing the property in her own name. She thereby obtains a good legal title which she can convey to a grantee, who cannot be held responsible for her application of the proceeds of the property.

GUARDIAN AND WARD—GUARDIAN AD LITEM CANNOT PURCHASE WARD'S PROPERTY.—The provision of a statute that "a guardian of an infant party to the action shall not purchase or be interested in the purchase of any of the property sold" relates only to guardians ad litem and does not refer to guardians in socage.

GUARDIAN AND WARD—AVOIDING GUARDIAN'S PURCHASE—LACHES.—Where a socage guardian purchases the property of the guardianship at a foreclosure sale, and at the time of such sale the infant wards were of a sufficient age to be, and were more or less, conversant with such purchase, a delay of eight years after the youngest infant has attained his majority before making any objection to the purchase is such laches as bars relief as against subsequent grantees.

In 1879, James E. Boyer, the plaintiff's father, died intestate, leaving a wife and two children. In 1882, the mortgagee in a mortgage made by Boyer and wife instituted foreclosure proceedings, making Mrs. Boyer and the children defendants. A guardian ad litem was appointed for the infants. A judgment of foreclosure was obtained, and Mrs. Boyer became the purchaser at the foreclosure sale. She conveyed to the mortgagee, Palmer, who subsequently conveyed to the defendant Blair, who, in turn, conveyed to the defendants East. This action was commenced in 1896 against the persons who had acquired title to the premises through the conveyances, to set aside the foreclosure sale, to recover the property, and for an accounting for rents and profits. The complaint was dismissed, upon findings that Mrs. Boyer had acquired good legal title. Plaintiffs appeal.

William T. Plumb, for the appellants.

Horace McGuire, for the respondents East.

George Raines, for the respondent Palmer.

584 GRAY, J. The plaintiffs contend: 1. That the sale to their mother was voidable under the rule in equity which forbids purchases by trustees; and 2. That it was void under section 1679 of the Code of Civil Procedure. Their first contention raises the question of the right of their mother, who was their guardian in socage, to purchase in her own name at the foreclosure sale. Under the statutes of this state, as their father had died intestate, they became vested with an estate in his lands and, being infants, their mother was their guardian in socage. Such guardianship continues, unless superseded by the appointment of a testamentary or other guardian, **585** under the provisions of the statute, until an infant arrives at the age of twenty-one years: 1 Rev. Stats., sec. 57, pp. 718, 719; *Byrne v. Van Hoesen*, 5 Johns. 66; *Emerson v. Spicer*, 46 N. Y. 594. As guardian in socage, there devolved upon her the custody of the infants' interests in the real estate (1 Rev. Stats., sec. 20, p. 151), with its consequent responsibilities, and she could not do any act in opposition to their interests. But she had also a personal interest in the lands as dowress and, in that respect, was a tenant in common with her children. Upon the foreclosure sale, she could protect that common interest, and she committed no breach of any legal duty toward

the infants in purchasing and in taking the deed in her own name. She had the right to do so, by reason of her own interest in the property, and, indeed, were she only interested as a guardian in socage, the deed might be to her in her own name. That she was such guardian by force of the statute did not constitute such an official capacity, as would have been the case were the guardianship one by appointment. The only presumptions, therefore, to be entertained with respect to her purchase at the foreclosure sale were that she bought to protect her own, or the common, interest. She thereby obtained a good legal title, which she could convey to her grantee. As to what she did with the property, or its proceeds, she was accountable to her children; but that was no concern of the grantee. However chargeable in law with knowledge of her legal relationship, he had the right to rely upon her legal right to buy in her own name and upon the presumption that she was acting in her own, or in the common interest, and he was not responsible for the application of the moneys.

The sale was regular; the infants' interests were represented in the action by the guardian ad litem, and there was no fraud found. Palmer's title and that of his grantees, therefore, are unassailable, unless the second contention of the appellants has any force, that section 1679 of the Code of Civil Procedure prohibited and avoided the purchase by their guardian in socage. That section is entitled: "Purchases by certain officers ⁵⁸⁶ prohibited." It provides that: "A commissioner, or other officer, making a sale, as prescribed in this title, or a guardian of an infant party to the action, shall not . . . purchase, or be interested in the purchase of, any of the property sold," etc. This section, found in a code which regulates procedure in civil actions, can have reference only, as its title indicates, to a purchase by an officer of the court, or by persons who stand in an equivalent relation. The code had already provided that a guardian ad litem, in the case of an infant defendant, should be appointed by the court, and this section has reference to such a guardian. In the Revised Statutes, from which the section is derived, the prohibition was against "any guardian of any infant party in such suit." The change in the language to "a guardian of an infant party to the action," I think has some significance. It appears to define, as the guardian aimed at, the guardian ad litem required to be ap-

pointed, in the course of the proceeding, by the court and includes him in the restriction as to purchasing at a judicial sale, which is imposed upon the commissioner, or other officer, making the sale. The section could not have been intended to effect any change in rules of law, or of equity.

The case of *O'Donoghue v. Boies*, 159 N. Y. 87, decides nothing adverse to these views. The mother, in that case, was not only the general guardian of the infants, but had been also appointed their guardian ad litem in the action of partition. Furthermore, the defendants there were the devisees of the real estate in question under the will of their father.

Upon a further ground the court should have refused to entertain the action. The defendants had the right to invoke the equitable doctrine that, as the plaintiffs had slept so long upon their rights, they should be deemed to have waived the right to attack the title acquired through their mother's purchase and conveyance. Whether a court of equity should come to the aid of those who have failed in diligence will depend upon the circumstances of the case. These plaintiffs were beyond the age when, at common law, guardianship in socage might ⁵⁸⁷ cease. One was in his fifteenth year and the other in his seventeenth year at the time of the sale. They were more or less conversant with what their mother had done; but upon attaining their majorities, in 1886 and 1888, though she survived until 1890, there was no assertion of any claim by them until in 1896. If they had the election to treat as void the sale to and the conveyance by their mother, it was incumbent upon them to be reasonably diligent and the delay in bringing such an action was, in my opinion, under the circumstances, fatal.

I think the judgment should be affirmed, with costs.

Bartlett, Martin, Vann, Cullen, and Werner, JJ., concur.

Parker, C. J., concurs in the result on the last ground stated in the opinion, viz., that a court of equity will not lend its aid to parties who have slept upon their rights for so many years under such circumstances as are disclosed in this record.

A GUARDIAN IN SOCAGE has an estate in the lands of his ward; he may lawfully receive the rents and profits thereof, and maintain in his own name an action to recover them: *Foley v. Mutual Life Ins. Co.*, 138 N. Y. 333, 34 Am. St. Rep. 456; *Combs v. Jackson*, 2 Wend. 153, 19 Am. Dec. 568.

A GUARDIAN MAY PURCHASE HIS WARD'S ESTATE for his own use and benefit, when he has no funds of the ward, and the estate is sold by the sheriff under an execution against the personal representative of the ward's ancestor: *Chorpenning's Appeal*, 32 Pa. St. 315, 72 Am. Dec. 789.

A GUARDIAN WHO BUYS IN HIS WARDS' LAND at a judicial sale and afterward sells it may be decreed to account to his wards for the difference between the price paid by him and the amount realized from the sale: *Hanna v. Spotts*, 5 B. Mon. 362, 43 Am. Dec. 132. And if a sale and conveyance are made by a guardian of the land of his ward to one who immediately reconveys to the guardian individually for the same consideration, the title of the ward is not divested: *Winter v. Truax*, 87 Mich. 324, 24 Am. St. Rep. 160.

MATTER OF ANDREWS.

[162 NEW YORK, 1.]

WILLS—EXECUTION.—IN THE CONSTRUCTION OF A STATUTE regulating the execution of wills, the intention of the legislature, and not that of the testator, governs; and a will which in its execution does not conform to the provisions of the statute will be denied probate, however honest the intention of the testator may have been.

WILLS—EXECUTION—SIGNATURE.—A will, drawn on a printed blank, being one piece of paper folded so as to make a sheet of four pages, with the attestation clause printed at the top of the second page and executed at that point, so that the first two pages make a complete will, is not subscribed at the end as required by the statute, where the third page contains further dispositions of property, even though the third page has been marked "2nd page" by the draughtsman, and the second page has been marked "3rd page."

George G. Reynolds, for the appellant.

Armour C. Anderson, special guardian, for the infant legatees.

Frederic W. Adey, for the respondents.

⁴ **BARTLETT, J.** This case comes before us under circumstances so unusual that a few words of comment may not be out of place. The surrogate of Kings county refused probate to the will we are about to consider, on the ground that it was not subscribed at the end thereof, as required by the statute of wills: 2 Rev. Stats., sec. 40, p. 63, 2 Banks' 9th ed., p. 1877. In so doing, he followed the settled law of this court for years, and many well-reasoned English cases, when construing a stat-

ute similar to our own: 1 Vict., c. 26. The learned appellate division affirmed the surrogate's decree with a divided court, giving utterance at the same time to a protest both emphatic and unanimous.

The opinion states that the conclusion reached was solely under the stress of authority, and that, unaided by the light of judicial decisions, a contrary result would have followed. One of the dissenting justices stated that, while he recognized the principle of stare decisis, cases sometimes arise when a judge is justified in refusing to follow a decision of the court of last resort. The other dissenting justice wrote an opinion in which he succeeded in reaching the conclusion that neither the statute of wills, nor the cases which had compelled the majority of his brethren to reluctantly affirm the surrogate's decree, called for any such result.

As the opinion of the appellate division concedes that the question presented is not an open one in this court, we might well content ourselves with an affirmance of the judgment did we not feel constrained by judicial courtesy to re-examine the legal situation that has been so pointedly called to our attention.

It has long been the settled policy of this state to require certain formalities to be observed in the execution of wills; these provisions are exceedingly simple, and calculated to prevent ⁵ frauds and uncertainty in the testamentary dispositions of property: *Matter of O'Neil*, 91 N. Y. 520; *Willis v. Lowe*, 5 Not. Cas. 428.

Section 40 (2 Rev. Stats., p. 63, 2 Banks' 9th ed., p. 1877) reads as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." These are the only restrictions imposed upon a testator when executing his will, and they appear to be wise, reasonable, and easily understood.

It has been repeatedly laid down as the rule in this state, in cases we shall presently discuss, that the intention of the testator is not to be considered when construing this statute, but that of the legislature. The question is not what did the testator intend to do, but what has he done in the light of the statute.

It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better this should happen under a proper construction of the statute than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills.

It may be well, before examining the will which is the subject of this appeal, to refer to a few of the cases which construe the provision of the statute requiring the testator and the witnesses to subscribe at the end of the will.

⁶ In *Sisters of Charity v. Kelly*, 67 N. Y. 409, it was held that the provision of the statute requiring the testator to subscribe "at the end of the will" means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will.

In *Matter of O'Neil*, 91 N. Y. 516, a printed blank was used and the formal commencement was printed on the first page and the formal termination printed at the foot of the third page. The entire blank space was filled with writing and apparently for want of room a portion of a paragraph containing material provisions was carried over to and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or anything indicating their relation to each other. The name of the testator was written at the end of the printed form and the names of the witnesses written below the formal attestation clause on the third page. This court held that there was no legal subscription of the will and affirmed the judgment denying probate.

Chief Judge Ruger, who wrote the opinion of the court, said: "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be

invoked in the construction of the statute regulating their execution. In the latter case, courts do not consider the intention of the testator, but that of the legislature. . . . The statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. . . .

"It will be seen in all of the cases cited there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will."

⁷ In *Matter of Conway*, 124 N. Y. 455, a blank form was used, the whole of which was upon one side of the paper. A space was left for the dispositions to be made, preceded by the words "I give, devise, and bequeath my property as follows." The blank space was filled up by three complete devises; at the end of the last was underlined, in parentheses, the words "carried to back of will." Upon the back of the sheet was written the word "continued"; following it were various bequests and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper and those of the witnesses under the attestation clause. It was held by the second division of this court that there was not such a subscription and signing by the testator as required by the statute, and that the will had been improperly admitted to probate.

Judge Parker, in delivering the opinion of the court, said: "The aim of the statute is to prevent fraud—to surround testamentary dispositions with such safeguards as will protect them from alteration."

The learned judge also declared in substance that the admitted intention of the testator that the provisions appearing on the page following his signature should form a part of his will, would in no way affect the question before the court.

In *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, it was held that a will drawn upon a printed blank covering only one page, and signed by the testator and subscribing witnesses at the foot of the page, is not subscribed by the testator at the end of the will, as required by the statute, when the blank space in the printed form is filled up by subdivisions marked, respectively, "First" and "Second," followed by the words: "See annexed sheet," and additional subdivisions marked, respectively, "Third" and "Fourth," are written on a separate piece of

paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. It was held that the question presented was not an open one in this court, and that the will was not legally subscribed.

The court again approved the doctrine that the existence of ⁸ good faith did not affect the question pending, as the intention of the legislature, and not that of the testator, governed.

In *Matter of Blair*, 84 Hun, 581, this court affirmed the judgment of the general term, first department, on the opinion below, which reversed a decree of the surrogate's court admitting the will to probate. This instrument consisted of eight pages. The testator signed at the bottom of the seventh page, and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page. After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executor to sell at private sale a certain piece of real estate, and to devote the proceeds of sale to liquidating any deficiency in interest or cash bequests under the will. The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not: *In re Blair's Will*, 152 N. Y. 645.

In each of the cases cited, it was very clear that the will was not legally subscribed, and that to have admitted it to probate, by yielding to the suggestion that it was an honest attempt to make a will, would have been a practical repeal of the statute as to subscription at the end of the instrument.

Our present statute of wills, requiring that a will should be subscribed at the end thereof, is similar to 1 Victoria, chapter 26, which was in force in England from 1837 until 1853, when it was amended by 15 and 16 Victoria, chapter 24, known as "Lord St. Leonard's act." Prior to this amendment, the English courts construed the act as strictly as our own have the present statute of wills: *Willis v. Lowe*, 5 Not. Cas. 428; *In re Parslow*, 5 Not. Cas. 112; *In re Tookey*, 5 Not. Cas. 386; *Ayres v. Ayres*, 5 Not. Cas. 375; *Sweetland v. Sweetland*, 4 Swab. & T. 6; *Smee v. Bryer*, 6 Moore P. C. C. 404. In the latter case, Lord Langdale, delivering the opinion of the court, said at page 410: "It may happen, even frequently, that genuine wills, namely wills truly expressing the intentions of the testators, are made without observation of the required forms, and, whenever that happens, the genuine ⁹ intention is frustrated by the act of the legislature, of which the general object is to give effect to the intention. The courts must consider that the

legislature, having regard to all probable circumstances, has thought it best, and has therefore determined to run the risk of frustrating the intentions sometimes, in preference to the risk of giving effect to, or facilitating, the formation of spurious wills, by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention in some cases, by requiring forms, is less than the evil probably to arise by giving validity to wills made without any form in all cases."

The reasoning of our own and the English courts finds support in two states where the statute of wills is substantially the same as in New York: *Hays v. Harden*, 6 Pa. St. 409; *Glancy v. Glancy*, 17 Ohio St. 134.

We come, then, in view of the law as it now stands, to the will before us. The testatrix was an unmarried woman, aged about sixty years; she left her surviving no nearer relatives than first and second cousins; no part of her estate is given to any relative; a stranger to her blood is sole executor; the will is in his handwriting, and the proceeds of sale of testatrix's house and lot in Brooklyn are given one-half to him and one-half divided equally between two religious societies. In addition to this, the testatrix gave eight money bequests, four to religious societies and a cemetery and the others to persons not of her blood. These bequests aggregate about four thousand two hundred dollars.

The residuary clause is as follows: "The rest, residue, and remainder of my estate I give unto my executor, to make disposition of and divide in such manner as he in his judgment may deem best and proper."

No undue influence is charged. The estate is estimated at about fifteen thousand dollars. The will was drawn on a printed blank, being one picce of paper, consisting of a sheet of four pages, the two leaves of which were joined from top to bottom on the left side.

The formal opening part of the will is printed on the top ¹⁰ of the first page, leaving the rest of that page blank; the closing part, containing the clause for the appointment of the executor, and that which follows, including the attestation clause, was printed on the top of the second page of the first leaf, leaving the rest of that page and both pages of the second leaf blank. The draughtsman filled the blank on the first page and then turned to the first page of the second leaf, being the third page of the blank, and filled that, marking it at the top "2nd page." He then turned to the

second page of the first leaf, containing the closing part of the will as before stated, in print, marked it at the top "3rd page" and completed the instrument, save as to its execution, by filling the blanks at the top of that page, except the blank for the date, which was left to be filled in at the time of execution.

It is to be observed that a complete will was made out on the two sides of the first leaf, being the first and second pages of the blank; all of the first side of the third leaf, marked "2nd page" could have been written after execution, as no sentence thereof is continued from the first page of the will, nor carried over to the alleged third page thereof. The fourth page of the blank could have been written over in the same way.

The first page of the will contains the money legacies, the direction to sell the real estate and divide the proceeds, and two legacies of personal property. The alleged second page of the will contains bequests of personal property and the residuary clause.

We have here on one entire piece of paper, folded so as to make four pages, a complete will so far as form goes, on the first and second pages, and then follows on the third page of the blank and after the signatures of testatrix and witnesses on the second page of the blank a page marked "2nd page," not connected with the will proper in any way, but complete by itself.

The question is not, whether from the proofs in this case the page following the signatures of the will is in fact a part of testatrix's will by reason of her established intention, but is ¹¹ the instrument so drawn subscribed at the end thereof as the statute commands. We are of opinion that it is not legally subscribed, and that to hold otherwise would open the door to gross fraud and be contrary to the statute and the settled law.

It was suggested on the argument of this case that the effect of the statute of wills, as strictly construed by this court, is to defeat the intention of many testators, while the fraudulent addition to wills was a crime of rare occurrence. The fallacy of this argument consists in overlooking the fact that the number of frauds prevented by our wise and simple statute can never be known. We might as well ask how many commercial crimes have been prevented by the statute of frauds. The case at bar is one of the strongest illustrations of the wisdom of the statute of wills that has ever come to the attention of this court.

With a complete will on the first and second pages of a blank containing four pages, there is nothing to prevent filling

up the vacant third and fourth pages with any number of additional provisions, including, as in this case, a residuary clause allowing an executor to dispose of the residue in such manner as he deemed proper. The defeat of testamentary intention in a few cases is not due to the statute, or the construction of it by the courts, but to the fact that scriveners and other laymen, ignorant of the simple and clear provisions of the statute, are permitted to draw wills.

It is urged with much ability, by the learned senior counsel for the appellants, that the alleged second page of this will can be read into it by invoking the doctrine of incorporation as established in England and, to some extent, in this state. We are of opinion that, under the facts here disclosed, that doctrine has no application; if it were otherwise, the evasion of the statute would be so easily accomplished as to render its repeal unnecessary.

We have to say in conclusion that it is quite possible we ¹² have given to this appeal undue importance, involving, as it does, a question of law settled in this court, but we desire to express in the most emphatic manner our approval of the statute of wills as now construed.

The order appealed from should be affirmed, with costs to respondent and special guardian to be paid out of the estate.

Parker, C. J., Gray, O'Brien, Haight, Martin, and Vann, JJ., concur.

WILLS—EXECUTION AND CONSTRUCTION.—The omission of any of the statutory requirements for the execution of a will is fatal to its operation: *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104. The intent of a testator must govern in the construction of his will if not contrary to some positive rule of law: *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181.

WILLS—SIGNATURE.—If a will is drawn upon a printed blank covering but one page and containing clauses numbered first and second, at the end of which the testator and the witnesses sign, and such page directs attention to an annexed slip, and there is annexed by metal staples another page containing further clauses, numbered third and fourth, such will is not subscribed at the end as required by statute, and cannot be admitted to probate: *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616. See, too, *Wine-land's Appeal*, 118 Pa. St. 37, 4 Am. St. Rep. 571.

HASCALL v. KING.

[162 NEW YORK, 134.]

WILLS—TRUST FOR ACCUMULATION OF INCOME—PAYMENT OF MORTGAGES.—The application of the income of a trust estate to the payment of mortgages on such estate, which results in withholding a portion of the income from present beneficial enjoyment, to the end that the estate may be augmented in value, constitutes an accumulation within the meaning of a statute prohibiting the accumulation of the rents and profits of real estate except during the minority and for the sole benefit of minors, and is invalid even though such accumulation takes the form of the payment of indebtedness.

TRUST TO LEASE LAND—PAYMENT OF MORTGAGE.—Under a statute authorizing the creation of an express trust "to sell, mortgage, or lease real property . . . for the purpose of satisfying any charge thereon," the word "lease" is restricted in its meaning to a lease of land for a given sum, and does not authorize the trustee to lease in the ordinary sense of the term, and to receive the rents and profits of the land and apply them to the satisfaction of a mortgage thereon, since this would increase the capital of the trust estate in violation of a statute prohibiting the accumulation of rents and profits, except during the minority and for the benefit of minors.

TRUSTS—PART VOID.—Where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand and the other fall.

Action for the construction of a will. After making certain devises, the will gave the residue of the personal estate in trust to trustees for certain purposes. And after paying taxes, assessments, repairs, interest on mortgages, insurance, and all charges against the estate, and a certain income to the testator's widow, the balance of the net income was to be applied to the payment and discharge of any and all encumbrances or liens of any kind on the property. After such payments, the surplus income was to be divided among his children. The question was as to the validity of this trust.

Peter B. Olney and Nathaniel S. Smith, for the appellants.

William A. Boyd, for the respondents.

138 PARKER, C. J. Since 1828 the Revised Statutes have in terms prohibited the accumulation of the rents and profits of real estate and of the income of personal property, except during the minority and for the sole benefit of minors: 1 Rev. Stats., secs. 37, 38, p. 726. The last sentence of section 38 establishes the penalty to be visited upon all attempts to offend against these provisions, and reads as follows: "And all direc-

tions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void." The revisers, in their report, assigned as a reason for limiting the power of accumulation to one of the three cases specified in the statute of 39 and 40 George III, chapter 98, namely, "during the minority of any person or persons who, under the deed or will directing the accumulation, would, if then of full age, be entitled to such rents and profits," that "it is to the period last indicated that the revisers propose to confine the power of accumulation, conceiving that this restriction furnishes the most effectual means of guarding against the abuses to which directions of this nature are admitted to be liable, and believing that it embraces the only case in which the purpose of the accumulation is such as ought to be sanctioned, namely, for the benefit of infants entitled to the next eventual estate." The purpose of the revisers is made so clear by their report, and the language employed by them in drafting sections 37 and 38 so aptly expresses that purpose, that no case prior to this one can be found in this court where an attempt has been made to uphold a trust which did not provide that the accumulated income should, in part at least, be used for the benefit of minors. And the understanding of the courts, as well, I think, as that of the legal profession generally, as to the effect of sections 37 and 38, found expression through Judge Andrews in the case of *Pray v. Hegeman*, 92 N. Y. 508-515, as follows: "The main purpose of the thirty-seventh section of the statute was not to ¹³⁹ limit the term of accumulation previously permitted. The legislature intended to uproot the doctrine that the rents and profits of property might be accumulated and the enjoyment postponed, with a single exception." The learned judge further said: "The statute does not permit an accumulation of the rents and profits of land, or the income of personal property for the benefit of adults for any period of time, however short. The general policy of our law favors the greatest freedom of alienation of property consistent with the necessities of families, and the making of reasonable provision for the various contingencies which may be expected to arise, requiring the postponement of the vesting of estates, and the suspense of the power of alienating the corpus of property is permitted only within narrow limits. But the right to direct the accumulation of the fruits and profits of property is much more restricted than the right to control the property itself. It is permitted only in a

single case and for a single purpose, viz., during minority, and for the benefit of the minor during whose minority the accumulation is directed." This was said by the learned judge not only with sections 37, 38, and 55 before him, but, as appears by his discussion of the cause, having in mind the case of *Hawley v. James*, 16 Wend. 62, which we shall consider later.

In the *Pray* case, the will provided for an accumulation during minority, and, after the expiration of minority, the giving of the income arising from the accumulated fund to the minor for life, the principal on his death to his issue or over to other persons. Other attempts have been made to thwart the purpose of the statute by appearance of conformity with its provisions, such as in the cases of *Boynton v. Hoyt*, 1 Denio, 54, *Kilpatrick v. Johnson*, 15 N. Y. 322, and *Barbour v. De Forest*, 95 N. Y. 13, but without avail; for this court has ever been faithful in giving full force and effect to both the letter and spirit of the statute. Only two cases besides this one have been found in the reports of this state where it has been held that a trust is valid which permits some part of the rents and profits of the real estate to be applied in ¹⁴⁰ payment of mortgages thereon. Those cases will receive consideration later on, for our next step is to inquire whether the trust attempted to be created by this will authorized the accumulation of some part of the rents and profits of certain real estate, and the application thereof in payment of an indebtedness of the testator secured by mortgages on certain parcels of his real estate.

The will was executed on the thirteenth day of January, 1896, and in July following the testator died, leaving a widow and four children, all of whom were of full age. His real estate consisted of six parcels in New York county and a farm in Saratoga county. If all of the real estate be carried into the trust under the sixth clause of the will, as appellant contends, then its purpose is to provide that the net rent, income, and profits of real estate of the value of about \$206,000, plus the value, which has not been proved, of the farm and the parcel known as No. 49 West 88th street, shall, after the payment of the sums directed to be paid to the widow annually, be devoted to the payment of mortgages aggregating \$46,500, one of which, at least, a mortgage for \$25,000, was not due at the time of the death of the testator. If the factory property and the Saratoga farm are held to be disposed of by the third and fourth provisions of the will, then the rent, income,

and profits of the real estate devised in trust are of the value of \$156,000, and are to be devoted, after the payment of a certain sum annually to the widow, to the payment of interest and principal of mortgages aggregating \$34,000.

In other words, the scheme of this provision of the will is to increase the value of the estate from \$206,000 to \$252,500, if one construction be adopted, and if the other, then from \$156,000 to \$190,000. The object of the provision is to have a certain portion of the income go into and form a part of the estate by decreasing the burden resting upon it, thereby inevitably increasing the capital of the estate; and, if such object can be carried out, the principal of the estate will ultimately be greater than at present by \$46,500 in the one case and by \$34,000 in the other. The result aimed at is precisely the ¹⁴¹ same as if the testator had directed that the surplus income should be deposited and held until the principal of the estate should be divided among those entitled to it at the termination of the trust. If a part of the income of the real estate of which the testator died seised and possessed be permitted to be devoted to the payment of mortgages thereon, all of the income may be devoted to such purpose, and hence it will be easy for a man desiring to postpone the division of his estate as long as possible to devote all of his estate to the purchase of income producing real estate having a substantial equity over and above the mortgages thereon, and apply all of the surplus income arising therefrom during two lives in being to the reduction of the principal of the mortgages, and thus turn over at the end of the trust term the principal of his estate, plus the accumulations of such principal during a comparatively short or a very long period, dependent, of course, upon the length of life of the survivor of the two persons by whom the trust term is measured. For example, if A should buy of B real estate of the value of \$100,000, paying \$50,000 on account of the purchase price and giving a long term mortgage thereon for \$50,000, with an agreement that the net income of the property might be applied in payment of the interest on the mortgage and in the reduction of the principal until the entire principal sum should be paid, and should then devise the real estate in trust with directions to the trustee to thus apply the income during the lives of the two persons named therein, there would be a fair chance that the distribution of the estate would be postponed until the mortgage could be paid off and the capital of the estate to be distributed should

have been increased from \$50,000 to \$100,000. While the case put as an illustration differs in detail from the one under consideration, it does not differ in principle, and, if the one is authorized by statute, so is the other.

The suggestion that a restricted meaning should be given to the word "accumulation" as used in the statute which would operate to make it ineffective unless the trustees be directed to retain the income for a considerable time to await the maturing ¹⁴² of mortgages, has no support either in the judicial history which led to its use by the revisers or in the spirit of the statute employing it; but it should be said in passing that the mortgage of \$25,000 did not become due until some time after the probate of the will. The capacity which a man had in England under the common law to lock up the income of his estate, whether real or personal, was finally carried to such extremes that a will was made in 1796, by which a testator devised his real estate, the income of which was four thousand pounds per annum, and his personal estate estimated at half a million pounds sterling, to trustees to accumulate for nine lives, when, by the ordinary chances of life, the aggregate would amount, at interest, to over nineteen million pounds: *Thellusson v. Woodford*, 1 Bos. & P. N. R. 396; 4 Ves. 227; 11 Ves. 112. This will contributed its part toward persuading parliament of the wisdom of passing the act to which reference was made when citing the report of the revisers of our statutes, and in bringing about the still more drastic action on the part of the legislature. The meaning which the word "accumulation" has in course of time come to have in our law is stated in the *Century Dictionary* as follows: "The adding of the interest or income of a fund to the principal, pursuant to the provisions of a will or deed preventing its being expended. The law imposes restrictions on the power of a testator or creator of a trust to prohibit thus the present beneficial enjoyment of a fund in order to increase it for a future generation."

It is precisely that which is attempted in this case, namely, a withholding of a portion of the income from present beneficial enjoyment, to the end that the estate may be augmented in value, and thus, at the termination of the trust, pass to those whom the testator would have enter into the enjoyment of it at that time. Had the testator intended otherwise, he could readily have provided for satisfying the encumbrances by a sale of one or more of the parcels of real estate that he owned in

the city of New York. It was all marketable real estate, but he chose not to sell it, and instead attempted to build a ¹⁴³ trust on a plan in violation of the letter and the spirit of the statute which prohibits the swelling of an estate by the accumulation of income, except for the benefit of minors and during their minority. The books will be searched, I think, in vain for a case in this state, prior to this one, in which it is suggested that the application of the income of a trust estate in the payment of mortgages does not constitute an accumulation, as that word is employed in the statute. The other view is adopted in the few cases in which the question was presented. In *Fisher's Estate*, 4 Misc. Rep. 46, 25 N. Y. Supp. 79, Surrogate Ransom had up for consideration a will empowering executors to pay off mortgages by applying for that purpose fifteen per cent of the net income of the estate, and it was held that the trust was void, because in violation of sections 37 and 38 of the statutes. The learned surrogate, in the course of his opinion, said: "The application of a part of the income of the trust estate for the payment of mortgages on the real estate, forming part thereof, is invalid, as it provides for an accumulation of such income for a purpose not permitted by the statute. . . . It goes into, and forms part of, such estate, and increases the capital, the income of which is distributable under the trusts in the will, and the augmented principal ultimately. The provision is in effect precisely the same as if the testator had, in so many words, required the trustee to apply the income to swell the principal of the trust fund." *Wells v. Wells*, 30 Abb. N. C. 225, was a suit in equity brought for the construction of a will, the second clause of which in part provided: "But if there is not enough derived from the proceeds of said sale [referring to a piece of property that he had ordered sold for the payment of debts] to pay all of my said debts [and the court, in construing the will, held the debts thus referred to were debts secured by mortgage upon the lands affected], that then for my said executors, or the survivor of them, to apply the net income from what other property I may die possessed of toward the payment of said debts, until all my said debts are paid in full." This is held to have been in violation of the provisions of the Revised ¹⁴⁴ Statutes regulating the accumulation of rents and profits. In *Matter of Hoyt*, 71 Hun, 13, the will in part directed the executors to lease all the rest, residue, and remainder of the testator's real and personal prop-

erty, and, after deducting the taxes, insurance, and interest, on mortgages from the rents and income arising therefrom, to deposit the balance in a savings bank, in order to create a fund to liquidate or help pay off an indebtedness against the estate, and this is held to have been in contravention of the statute and void. In *Matter of Hayden*, 77 Hun, 219, the testator did not provide in terms for the accumulation of income, but, in carrying out the provisions of his will, it so happened that there was a small accumulation of income from securities set apart for the production of annuities, and the question presented was whether such amount of income should have been paid to the two daughters of testator upon the division of the estate, or whether it should be held as principal by the executors of the will as trustees of the shares of the daughters under the codicil, and it is held in an opinion written by Presiding Justice Van Brunt that the testator "had no power . . . by any means, direct or indirect, to prevent the absolute vesting of the income derived from his estate in somebody, and he could only direct any portion of such income to be accumulated during the minority of the owner of the share of his estate from which it was derived." In *Matter of Rogers*, 22 N. Y. App. Div. 431, Mr. Justice Cullen tersely stated the proposition in these words: "But if a testator's intent is to make that principal which is income in the case of a trust of the nature of the one before us, such intent is not in conformity with law, but in express contravention of it." Other cases in which it is assumed without discussion that such a disposition of income constitutes an accumulation within the meaning of the statute will be referred to later on, when I come to an examination of the cases in which sections 37, 38, and 55, and their relation to each other are directly considered.

But I pass from the consideration of the question whether there was an accumulation in this case, with the assertion ¹⁴⁵ that it cannot be denied that the will provides for the increase of the estate from the rents, income, and profits arising therefrom, and it none the less provides for its enhancement from the income of the trust estate, because the method provided takes the form of an extinguishment of indebtedness. The statute aims to prevent such a disposition of an estate as would deprive some one of the present enjoyment of each and every dollar of the net income, with the single exception of minors, and the court should give full effect to the statute, and not

countenance an accumulation of income by indirection where it would not by direction.

We come now to the section which is put forward in justification of a decision that not only opens a door to a violation of the provisions of sections 37 and 38, but points out a method by which it can be done as effectively as if the statute in terms permitted the investment of the income arising from a trust estate during a period of two lives in being in the purchase of additional real estate. The method may not be quite as convenient of execution, as it requires, on the part of the testator, in his lifetime, other action than that of simply making a will; but it is fully as effective, as has already been shown.

Subdivision 2 of section 55 of volume 1 of the Revised Statutes, page 728, is relied upon as creating an exception to the rule established by the statute against accumulations, an exception which, if allowed, may be destructive of the rule. Section 55 (now section 76 of the real property law) reads as follows: "Purposes for which express trusts may be created—An express trust may be created for one or more of the following purposes: 1. To sell real property for the benefit of creditors; 2. To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto; ¹⁴⁶ 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."

It is under the second subdivision, which, besides giving authority to sell and to mortgage lands for the benefit of legatees and for the purpose of satisfying any charge thereon, also authorizes the leasing of lands for such purpose, that the claim of the right to receive the rents and profits of land and to apply them from time to time in payment of any charge on the land is made. It will be noted that by the two following subdivisions, 3 and 4, the trustee is specifically authorized, by 3, to receive the rents and profits of lands, to apply them as they are received in the first case; and, by 4, to accumulate them for the purposes authorized by, and within the limits prescribed in, the first article of the title, and, while subdivision 2 does not in terms authorize the trustee to receive the rents and profits of land, it is sought to give to the word "lease" such a construction as will import into the subdivision that authority. In

other words, notwithstanding two of the four subdivisions of section 55 expressly authorize the trustees to receive the rents and profits of land, while the other two subdivisions do not, but instead treat of the leasing of lands precisely as of their selling and mortgaging, it is proposed to give to the word "lease," appearing in that connection, such scope and effect as will permit the creation of a trust for the leasing of lands by which there can be an accumulation in violation of the provisions of sections 37 and 38, to which subdivision 4 of section 55 applies; and the strongest argument ever presented in support of that contention is made by the learned justice who, in *Becker v. Becker*, 13 N. Y. App. Div. 342-349, says: "It is the common eulogium of the Revised Statutes that in no other compilation of law are technical terms and words of art used with more precision or as appositely as in that work." The argument by which the conclusion is reached that the second subdivision authorizes the creation of an express trust for the purpose of the accumulation and application of the rents and profits of land in ¹⁴⁷ payment of mortgages or other charges thereon is, in brief, that the word "lease" must be given its strict definition, as a contract for the possession and profits of lands and tenements on one side and a recompense of rent or other income on the other, and as the reception of rent is the fundamental idea connected with a lease, and the relation of landlord and tenant must be established in order that the landlord may receive the rent, it follows that it was the intention of the revisers in the use of the word "lease" to authorize the leasing of lands for a long or short period for a fixed annual rental, or to work on shares with authority in the trustees to apply the net rent, or net income, or profits resulting therefrom, in the payment of mortgages or other liens upon the whole or some part of the real estate devised in trust. It must be conceded that, if there were no other provisions of the statute bearing directly or indirectly upon the subject of the receipt of rents and profits of lands and their accumulation than is to be found in subdivision 2, the argument to which I have referred could not well be met. But as it is, we find that, by giving to the word "lease" that full force and effect which it is urged can be given, it necessarily results in permitting the creation of a trust by which may be increased a testator's estate by adding to its capital the rents and profits of land, in violation not only of the spirit, but of the express letter of the statute as found in sections 37 and 38 of the same title.

Again we find that the authorization to lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon, is to be found in a subdivision which is in all other respects (and I think in respect to leasing as well) a provision for alienation, and not for the suspension of the power of alienation. The trusts therein authorized are to sell land, or some interest in it, the land descending subject to the execution of the trust, which may include either the power to sell or the power to mortgage, or the power to lease for a gross sum to be applied by the trustee for the benefit of legatees, or in satisfaction of any charge thereon. In that connection, it should be observed that the two following subdivisions provide ¹⁴⁸ in express terms that the trustee should receive the rents and profits of lands, and it is significant that the opening sentence of each of such subdivisions should employ that language, when in the second subdivision there is no suggestion that the power to receive rents and profits is conferred. Again, it is significant that whereas sections 37 and 38 provide in terms for an accumulation of the rents and profits of real estate for the benefit of one or more minors, and prohibit the accumulation of such rents and profits for any other purpose, the fourth subdivision of section 55 should provide that an express trust may be created for that purpose. Thus, the revisers open section 37 with an authorization for "An accumulation of the rents and profits of real estate," and close section 38 with the declaration: "All directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void"; while subdivision 4 of section 55, which authorizes an accumulation for the purposes expressed in sections 37 and 38, empowers the trustee "to receive the rents and profits of lands." A careful repetition of the quoted words, in each of the sections 37 and 38 and subdivision 4 of section 55, in view of the known accuracy of the revisers, strongly indicates an intention to exclude from a trust to mortgage, sell, or lease lands, the right to receive the rents and profits of lands.

There is a meaning that can be given to the word "lease," in the connection in which it is used, which will make all of the provisions that we have been considering harmonious, and give to sections 37 and 38, prohibiting an accumulation of income except for the benefit of minors, their full force and effect; and it would seem as if it were the plain duty of the court to so construe the statute as to harmonize the several provisions and at the same time effectuate the general policy of the

statute. The sense in which the word "lease" is employed cannot be better portrayed than in the language of Presiding Justice Van Brunt in *Cowen v. Rinaldo*, 82 Hun, 479-485: "The evident intention of the statute was the creation of a trust to sell land and receive the proceeds thereof for ¹⁴⁹ the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying any charge thereon, to mortgage land and receive the proceeds thereof for the benefit of legatees or for the purpose of satisfying any charge thereon, and to lease lands for a given sum which the trustee is to receive for the benefit of legatees, or for the purpose of satisfying any charge on said land, the fee of the land descending." That construction seems to me, in view of the other provisions of the statute, the natural one, and, therefore, the one that should be adopted.

I come now to a consideration of the cases bearing upon this question. The first case is that of *Hawley v. James*, 16 Wend. 62. It was decided in 1836, some eight years after the enactment of the Revised Statutes. It is there held that subdivisions 1 and 2 of section 55 provide for a trust for alienation for the purpose of paying debts and legacies and charges on real estate, but not for a trust to receive the rents and profits of lands devised to trustees. Judge Bronson says, in the course of the discussion: "There may be some difficulty in ascertaining why the word 'lease' was inserted in the second subdivision, and, if we attach to it all the consequences which may be deduced from the common-law doctrine in relation to the power of making leases, it will include the right to take rents and profits. But that consequence will not follow in this case, for the reason that it would be against the manifest intent of the legislature; and it is one of the first and most important rules of interpretation that a statute shall be so construed as to carry into effect the intent of the law-makers. . . . The first subdivision authorizes a trust 'to sell lands for the benefit of creditors.' This is a trust for alienation, and it would have been absurd to subject it to a provision against perpetuities. The second subdivision is of the same character. It authorizes a trust to 'sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.' A mortgage is one mode of aliening the estate or a portion of it equal in value to the mortgage debt. In this case, as well as where an absolute fee ¹⁵⁰ is transferred, the trust is at an end the moment the conveyance is executed, so far as relates to any power over the estate. The trustee has no

further office to perform but that of making the proper application of the money. There is no suspense of the power of alienation, and it would, therefore, be idle to provide any safeguard against perpetuity. Was the word 'lease' in this connection used for the purpose of authorizing a trust of a different character? I think not. . . . If there is any possible way in which the power to lease can be exercised without suspending alienation, effect can be given to every word in the subdivision without contravening the manifest intent of the legislature. It is a power to make leases for the benefit of legatees, and I see no objection to demising the land directly to the legatee at a nominal rent for a period long enough to satisfy the legacy, or, in the case of a charge on the land, leasing it directly to the person entitled to the debt for a term which will satisfy the charge. It may also, I think, be leased to a third person, reserving the rent to the legatee or person having the charge."

The opinion of Judge Bronson in that case, written as it was shortly after the enactment of the Revised Statutes and showing as it does careful consideration of the subject, has generally been regarded as the correct construction of those sections and as conclusive upon the subject. About eight years later the chancellor, in *Parks v. Parks*, 9 Paige, 107, had before him for consideration a will which involved many interesting questions, and among the numerous provisions considered was one devising to a trustee in trust certain lots, from the rents and profits of which he was directed to pay the interest on the encumbrances, and use the profits and income for the support of cestuis que trust, and to employ as much as should not be required for that purpose in the reduction of the principal of the encumbrances. The chancellor, without referring to *Hawley v. James*, 16 Wend. 62, and without argument, says: "The Revised Statutes also have authorized the creation of an express trust to lease lands for the purpose of satisfying a charge thereon. The authority of the trustee, ¹⁵¹ therefore, to pay the interest of the encumbrances out of the rents and profits of these lots in the first place, and to apply so much of those rents and profits as might be spared from the support of the cestuis que trust, to reduce the principal of the encumbrance on their respective lots, was therefore valid, and should be carried into effect, according to the intention of the testator."

The subject was not otherwise considered, and, in view of the elaborate discussion of the question when it was before the

court in *Hawley v. James*, 16 Wend. 62, it would seem as if that question had not been the subject of debate by the counsel who appeared before the chancellor and that his disposition of it was one of first impression. It is true that the decision in the *Parks* case was subsequently affirmed by the court of errors (see footnote, 9 Paige, 127). But we have no evidence that this question was the subject of contest on review. It is now said that the rule laid down by the chancellor in *Parks v. Parks*, 9 Paige, 107, was adopted by this court in *Leggett v. Perkins*, 2 N. Y. 297, and *Van Schuyver v. Mulford*, 59 N. Y. 426. But as we read those decisions no such question was involved. In *Leggett v. Perkins*, 2 N. Y. 297, the inquiry was whether a trust to receive the rents and profits of lands and pay them to a trustee could be sustained under the third subdivision of section 55, which authorizes a trust to receive the rents and profits of land and to apply them to the use of any person. Upon that question *Parks v. Parks*, 9 Paige, 107, was cited with approval, but that in no wise constituted an approval of all the other questions passed upon by the chancellor in that case.

In *Van Schuyver v. Mulford*, 59 N. Y. 426, the will of M. gave to his wife the rent, income, and profits of his estate during her life, and, if they were insufficient for her support, he directed his executor and trustee to pay to her from the body of the estate what should be necessary from time to time, and in another clause he directed that after the death of his wife the rents, income, and profits should be paid to his two daughters during life, after whose death the estate was devised to ¹⁵² the issue of his said daughters. *Parks v. Parks*, 9 Paige, 107, was cited upon the question presented by that will, but it has no bearing upon the question we are now considering. In *Cowen v. Rinaldo*, 82 Hun, 479-485, the very question now before us was under consideration, and the court, upon the authority of *Hawley v. James*, 16 Wend. 62, and in a very careful opinion by the presiding justice of the court, holds that a trust providing for the collection of rents, income, and profits of real estate, and, after the payment of certain legacies and the interest on mortgages, the applying of the remainder of the rents, together with the income and principal of the personal estate, to the paying off and discharging of the principal of mortgages on the real estate, was void. In *Becker v. Becker*, 13 N. Y. App. Div. 342, the court refused to follow this decision of the general term and that in *Hawley v. James*, 16 Wend. 62, and elected instead to treat the paragraph which I have

quoted from the long opinion of the chancellor in the Parks case as settling the question adversely to the decisions preceding and following it. The decision was made by a divided court and was not required, as I have attempted to show, by the decisions which have preceded it. The decision under review was made by the same court, which relied principally upon its previous decision in *Becker v. Becker*, 13 N. Y. App. Div. 342-349.

I have thus referred to all of the cases to which our attention has been called in which the question up for decision was directly involved, and it is apparent that this court is at liberty, to say the least, to construe the statutes in accordance with the reasoning of Judge Bronson in *Hawley v. James*, 16 Wend. 62, which not only results in producing harmony between sections 37, 38, and 55, but enables the statute to work out that policy which the revisers intended, a policy which in their wisdom was deemed for the public good and which has not since been seriously challenged.

But it does not follow that the entire trust should be held to be void because of the direction to unlawfully accumulate a part of the income. The rule is, that where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand ¹⁵³ and the other fall: *Schettler v. Smith*, 41 N. Y. 328; *Tiers v. Tiers*, 98 N. Y. 568; *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597. That rule is applicable to this situation and should govern it. The primary object of this testator, by the creation of this trust, was to provide an income for his wife, the accumulation for the purpose of paying the mortgages being secondary. Indeed, nothing was to be applied in payment of the mortgages until after the sum named by the testator should in each year be paid in full to his wife, the disposition of the balance being a mere ulterior contingent direction, entirely distinct from the primary trust. That being so, the former is separable from the primary trust and will not be allowed to invalidate it, and, after the purposes of the primary trust have been satisfied, the surplus income must be distributed among those entitled to the next eventual estate.

In all other respects we agree with the views expressed in the opinion written at the appellate division.

The judgment should be so modified as to accord with this opinion, and as thus modified affirmed, with costs to the ap-

pellants in all courts, and to the respondent in this court, payable out of the estate.

VANN, J. I concur in the result, because the will directs the application of rents, arising from lands not mortgaged, in payment of mortgages upon other lands, in violation of section 55 of the statute of uses and trusts, which, in my opinion, authorizes the leasing of lands in the usual way, but for the purpose only of satisfying any charge upon the particular lands leased. I do not agree with the conclusion of the chief judge that a valid trust cannot be created to lease lands, in the ordinary sense of the word "lease," for the purpose of discharging liens upon the specific lands directed to be leased. I feel bound to follow the later case of *Parks v. Parks*, 9 Paige, 107, where the question was before the court and was necessarily decided by the chancellor and, on appeal from his decree, by the court of errors also, rather than the earlier case of *Hawley v. James*, 16 Wend. 62, where the ¹⁵⁴ question, although ably discussed in one of the five opinions delivered, was not before the court, and no opinion was adopted by the court.

Gray, O'Brien, and Bartlett, JJ., concur with Parker, C. J.

Martin, J., concurs in result, and Vann, J., concurs in memorandum.

Haight, J., dissents.

TRUSTS VOID IN PART.—A will creating legal and illegal trusts may be permitted to stand, and to be enforced so far as the legal trusts are concerned, if they can be separated from the illegal trusts and upheld without doing injustice or defeating what the testator must be presumed to have wished: *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597. See the extended note to *Johnston's Estate*, 64 Am. St. Rep. 634-646, on the severability of forbidden trusts.

KRUG v. PITASS.

[162 NEW YORK, 154.]

LIBEL—NEWSPAPER ARTICLE—ATTACKING PROFESSIONAL ABILITY.—An article in a Polish newspaper, calling a physician a blockhead or fool, and appealing to the Poles of the community not to intrust themselves to his professional care, when he so hated them that he would not help them if he could, is libelous per se, because it charges a want of professional ability and integrity, and is actionable without proof of any damages.

LIBEL.—PUNITIVE DAMAGES in an action for libel are recoverable only upon proof of express malice or malice in fact, as distinguished from malice implied from the bare act of publication.

LIBEL.—IMPLIED MALICE in an action for libel consists in publishing, without justifiable cause, that which is injurious to the character of another.

LIBEL.—EXPRESS MALICE in an action for libel consists in publishing without justifiable cause and from ill-will, or some wrongful motive implying a willingness or intent to injure, that which is injurious to the character of another.

DAMAGES—PUNITIVE.—IN A TORT ACTION there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done, and which had some influence in causing it to be done.

MALICE—IMPUTING TO ANOTHER.—Where more than one person is sued, the malice of one defendant cannot be imputed to another without connecting proof.

LIBEL.—EXPRESS MALICE—EVIDENCE.—In an action for libel against several defendants, proof of expressions of ill-will made by one of the defendants several years prior to the publication of the libel and unknown to the other defendants, and the author of such expressions being ignorant of the publication of the article until some time after, does not establish express malice against the defendants so as to authorize a recovery of punitive damages, since the proven statements have no connection with the wrong done, and a judgment recovered against all the defendants must be reversed.

Action to recover damages for the publication of an article in a Polish newspaper. Plaintiff was a physician and druggist largely patronized by Poles. The material parts of the communication to the newspaper are translated as follows: "It was on the evening of the 3d or 4th of February, this year, that I met Dr. Krug. . . . I asked him about the health of one of the members of our society, asking him to tell me the truth, whether he is really sick. Dr. Krug got so mad about it that he began to holler as if the devils were skinning him, and abused the Poles for all the world stands. He hollered that the Poles are a damned cattle, a confounded nation, scoundrels, loafers, sows, and so on. Seeing that the Dutchman was furious with madness, I called his attention that he be more careful in

his words, for that can hurt him very much. Dr. Krug answered me, 'I don't care for the Poles. I can get along without them, and you can go to the devil.' . . . Now, I recall myself to all the Polish societies and all the Poles in Buffalo that they consider whether we can allow to be so disrespected by such a first or second fool as Dr. Krug. Can we trust ourselves and our families under the care of such a man when Dr. Krug so hates the Poles that he could drown each one in a spoon of water? A universal contempt should meet this scoundrel. . . . It would be a great time that the Poles of Buffalo be convinced what kind of an enemy to them Dr. Krug is. Marcel Smeja." Another translation uses the word "blockhead" in connection with "fool." Each defendant denied that he acted through malice.

J. W. Fisher, for the appellants.

Leroy Andrus, for the respondent.

159 VANN, J. The article in question, according to either translation, was libelous upon its face, because it charged the plaintiff with a want of professional ability and integrity and thus endangered the gain derived from his vocation: *Cruikshank v. Gordon*, 118 N. Y. 178; *Mattice v. Wilcox*, 147 N. Y. 624; *Flood on Libel and Slander*, 114. Referring to him as a physician, it called him a blockhead or fool, and appealed to all the Poles in Buffalo not to intrust themselves or their families to his professional care, when he so hated them that he would not help them if he could. The words used had a direct relation to his business and assailed him in his capacity as a physician. They touched his profession, because they held him out as unworthy of employment and appealed to his old patients to no longer employ him. Calling a physician, as such, a blockhead or fool necessarily reflects upon his ability to practice medicine, and speaking of him as so influenced by hatred toward his patients that he would not heal them, necessarily reflects upon his integrity as a physician. "To impute dunceness or want of scholarship to a member of either of the learned professions touches his profession": 160 *Cooke's Law of Defamation*. 18; *Peard v. Jones*, *Cro. Car.* 382. The reflection was not simply upon the character of the plaintiff as a man, but upon his character as a physician, for it imputed a want of those qualifications which attract patronage and are essential to the calling. It tended to undermine him in the confidence

of the community, which is the foundation of professional success. The article was actionable without proof of any damages, for the law imputes malice to the defendants and presumes that damages were sustained by the plaintiff from the bare act of publication: *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Van Tassel v. Capron*, 1 Denio, 250, 43 Am. Dec. 667; 13 Am. & Eng. Ency. of Law, 312.

While the plaintiff was thus entitled to recover on account of implied malice, his damages, without further proof, would be limited to such an amount as would fairly compensate him for the actual injury sustained. In order to recover punitive damages, also, it was necessary for him to furnish evidence of express malice, or malice in fact, as distinguished from malice implied. Implied malice, in an action for libel, consists in publishing, without justifiable cause, that which is injurious to the character of another. It is a presumption drawn by the law from the simple fact of publication. Express malice consists in such a publication from ill-will, or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act. It requires affirmative proof beyond the act of publishing, indicating ill-feeling or such want of feeling as to impute a bad motive. It does not become an issue, when the article is libelous on its face, unless punitive damages are claimed.

In order to establish express malice, the plaintiff was allowed to show, as against all the defendants, that, several years prior to the publication, the defendant Pitass had made remarks about him, expressing contempt and ill-will. There was no connection between these remarks and the other defendants, who neither heard them nor ever heard of them, so far as appears. It is undisputed that Pitass knew nothing about the article until some time after it had been published. He did ¹⁶¹ not directly or indirectly cause or consent to its publication. He was liable only because he owned the newspaper, and was responsible for the acts of his agents in publishing it. His previous statements did not cause the publication, nor have any effect upon it. Between those statements and the fact of publication there was no connection and no relation of cause and effect. They did not enter into, or become part of, or have any bearing upon, the wrong of which the plaintiff complains. As the article would have been published if they had not been made, they were immaterial, for they did not touch the wrongful act, and could not aggravate the damages. Puni-

tive damages, which are in excess of the actual loss, are allowed where the wrong is aggravated by evil motives in order to punish the wrongdoer for his misconduct and furnish a wholesome example. As was said by the supreme court of the United States in an important case: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations": *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 213.

Did Pitass inflict the injury upon the plaintiff maliciously, when he knew nothing about it at the time it was done, and was only liable as owner of the newspaper? Did he, "in a spirit of mischief," conceive the act done by his agent without his knowledge? Could his malicious remarks, made in 1890, leap forward, and, without knowledge or action on his part, become blended with the act of his agent in 1894? Did his agent, the editor, conceive the act "in a spirit of mischief," which never entered his own mind, but existed at a remote period in the mind of another? Did the writer of the article act under the influence of words neither spoken in his presence nor communicated to him in any way?

¹⁶² In an action for a tort there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done and which had some influence in causing it to be done. As was once said by this court, "malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings, to be inferred from it and the attending circumstances": *Howard v. Sexton*, 4 N. Y. 157, 161. Moreover, the malice of one defendant cannot be imputed to another without connecting proof. "If two be sued, the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal": *Bigelow's Odgers on Libel and Slander*, 296; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 658, 17 Am. Rep. 504; *Haines v. Schultz*, 50 N. J. L. 481; *Clark v. Newsam*, 1 Ex. 131, 139;

Carmichael v. Waterford etc. Ry. Co., L. R. 13 Ir. 313; Robertson v. Wylde, 2 Moody & R. 101.

Neither the author nor editor was a party to the malice of the publisher, and his malice did no harm because it had no effect upon the result. While he was responsible for their acts, they were not responsible for his motives, of which they had no knowledge. He was not responsible for his motives in connection with their acts, because there was no connection. The malice proved in this case did not cause the conduct complained of. The one guilty of malice did not commit the wrong except through an agent, who knew nothing about the malicious feelings of his principal. The principal was not liable for general malice, but only for such particular malice as was connected with the publication. The agent was not liable for the general malice of his principal, of which he knew nothing, and which had no connection with the wrong done. The writer of the article was not liable for the malice of another, of which he had never heard, and which had no influence upon the wrongful act. Yet the general malice of one out of three defendants, although it had no connection with the wrong, has, as it must be presumed, entered into the ¹⁶³ verdict of six thousand two hundred and fifty dollars against all, in violation of the rights of each.

As the malice proved neither caused nor prompted the publication of the libel, the judgment must be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., Gray, Bartlett, Martin, Cullen, and Werner, JJ., concur.

LIBEL AND SLANDER.—WORDS ARE ACTIONABLE PER SE which convey an imputation upon one in the way of his profession or occupation, and in such a case there need be no averment of special damages: *Morasse v. Brochu*, 151 Mass. 567, 21 Am. St. Rep. 474. On newspaper libel, see the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

LIBEL.—EXEMPLARY DAMAGES may be awarded in an action for libel if it appears that the defamatory publication proceeded from express malice or ill-will: See monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 341; but an instruction that such damages are allowable should not be given if there is an issue respecting malice in fact: *Childers v. San Jose Mercury etc. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40.

LIBEL.—MALICE in law signifies a wrongful act intentionally done without justification or excuse; malice in fact, an actual intention to injure or defame: See extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 337, 338.

DAMAGES, EXEMPLARY—WHEN RECOVERABLE.—A tort that sounds in exemplary damages exists when some right or property of a person is invaded, maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. To entitle a plaintiff to recover such damages, he must allege and prove the distinctive elements of such a tort: *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493, 28 Am. St. Rep. 883. See, also, the extended note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 878, 879.

MEIGS v. ROBERTS.

[162 NEW YORK, 371.]

STATUTES.—A CURATIVE ACT is a retrospective law acting on past cases and existing rights, and its effect is to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements.

STATUTES OF LIMITATION—JURISDICTIONAL DEFECTS.—The principle that jurisdictional defects are so vital in their character as to be beyond the help of retrospective legislation does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.

STATUTES—STATE TAX SALE—EFFECT.—A statute expressly providing that a tax deed from the state comptroller, after the lapse of the requisite time, shall be conclusive evidence that "all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and regularly given," is essentially a statute of limitations and not a curative act.

Theodore E. Hancock, for the appellant.

John P. Badger, for the respondent.

375 CULLEN, J. This action is in ejectment for a tract of wild land in Franklin county containing five hundred and eighty-five and three-eighths acres, and was commenced on April 2, 1897. The complaint alleged that the plaintiff was the owner in fee and entitled to the immediate possession of the lands; that since the 1st of January, 1895, the defendant had been and then was comptroller of the state of New York, and that as such comptroller he was and had been for two years in possession of the said lands. The defendant answered admitting that he was comptroller of the state during the period stated, and put in issue every other allegation of the complaint. The answer then set up that the people of the state were, and

for more than ten years past had been, in the actual possession of the premises under a certificate of sale made by the comptroller to the people of the state of New York on the twenty-third day of November, 1881, in pursuance of a sale held for nonpayment of taxes, and a conveyance made on the thirty-first day of October, 1884, under such tax sale after the expiration of the two years allowed by law for redemption, which conveyance was recorded in the office of the clerk of the county of Franklin on April 6, 1887. The answer further set forth as a separate defense a similar certificate, ³⁷⁰ executed on the twenty-ninth day of November, 1885, on a sale for unpaid taxes, a conveyance thereunder dated on the fifteenth day of February, 1890, and the record of the conveyance in the clerk's office of Franklin county on the third day of March, 1891. The defendant further pleaded that under the provisions of chapter 448 of the Laws of 1885, chapter 217 of the Laws of 1891, and chapter 711 of the Laws of 1893, the action was not brought within the time prescribed by law, and was barred by the statute of limitations.

On the trial, the plaintiff traced his title by a chain of conveyances from an original grant by the state in 1798. The evidence shows that beginning December 22, 1894, the defendant published for three weeks a notice stating that the premises in controversy, with others, were wild, vacant, and forest lands, located in Franklin county to which the state held title, and that from and after the expiration of the publication possession thereof would be deemed to be in the control of the state, under provision of section 13, chapter 711, of the Laws of 1893. The tax certificates and conveyances were put in evidence. The only attack on the conveyance of 1884 made in pursuance of the tax sale held in 1881 related to the notice of redemption published by the comptroller. It appears that on the sale one Josiah Talmage purchased one hundred acres of the tract for the full amount of the unpaid taxes, and that a certificate of sale was issued to him. Talmage never paid the purchase money or completed his purchase. While Talmage was thus in default the comptroller published a notice of unredeemed lands, in which it was stated as to these premises that one hundred acres were unredeemed. After the publication of the notice to redeem, the comptroller, on account of Talmage's failure to pay the purchase price, conveyed the whole tract of five hundred and eighty-five and three-eighths acres to the

state, as required by chapter 402 of the Laws of 1881. It is unnecessary to refer to the grounds on which the conveyance of 1890 was assailed. No proof was given of any possession or occupation of the premises by the plaintiff or his predecessors in title. The trial court dismissed the complaint substantially on the ground that the premises were part of the forest preserve, ³⁷⁷ and in the occupation of the state; that an action against the state to test its title could not be maintained except by consent of the state, and that the statute of 1893, chapter 711, section 13, was not sufficient to authorize the maintenance of such an action. The learned appellate division, by a divided court, reversed the judgment and granted a new trial, holding that the act of 1893 authorized the plaintiff to sue the state and oust it from possession by an action against the comptroller. It further held that the notice of redemption on the tax sale of 1881 was fatally defective, in that it stated that one hundred acres only of the premises in suit were unredeemed while the conveyance was of the whole tract; that for this defect the conveyance made in pursuance of the sale in 1884 did not pass title and that its invalidity was not cured by the provisions of chapter 148 of the Laws of 1885 (subsequently re-enacted in part in chapter 217 of the Laws of 1891 and chapter 711 of the Laws of 1893), which makes a conveyance of the comptroller upon tax sales, after the lapse of two years from its record in the county in which the lands are situated, conclusive evidence of the regularity of the proceedings in which conveyance was made.

We do not find it necessary to pass upon many of the questions which have been elaborately argued before us, or even the one upon which the decision of the trial court proceeded. We are of opinion that the lapse of time between the record of the conveyance of 1884 and the commencement of this action barred the right to the plaintiff to maintain it, even assuming the other questions in the case should be resolved in his favor. The learned appellate division held that the failure to publish a proper redemption notice was jurisdictional as to the conveyance of 1884, and hence not cured by chapter 448 of the Laws of 1885, and cited *Ensign v. Barse*, 107 N. Y. 329, and *Joslyn v. Rockwell*, 128 N. Y. 334, as authorities for that proposition. We think the learned court took too narrow a view of the statute of 1885. The statute, though in some aspects a curative law, is primarily and essentially much more; it is a statute of limitation. It was distinctly ³⁷⁸ held to be

such in two decisions of this court (*People v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498; 145 N. Y. 459), and by the supreme court of the United States: *Turner v. New York*, 168 U. S. 90. A curative act, in the ordinary sense of that term, is a retrospective law acting on past cases and existing rights. The power of the legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements: *Cooley's Constitutional Limitations*, 454. A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Forster v. Forster*, 129 Mass. 559. But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right: *Terry v. Anderson*, 95 U. S. 628; *Turner v. New York*, 168 U. S. 90. *Ensign v. Barse*, 107 N. Y. 329, was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell v. MacLean*, 123 N. Y. 474. In *Joslyn v. Rockwell*, 128 N. Y. 334, as well as in the two cases of *People v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498, 145 N. Y. 459, all of which arose under the statute of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional and not cured by that act. Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings, which are beyond the scope of retrospective legislation, will equally take a claim out of the bar of a statute of limitations. The existence of such defects was necessarily considered in the authorities cited because the statute of 1885, in terms, exempted from its operation cases where the taxes had ³⁷⁹ been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notices of redemption or in their publication; on the contrary, it is expressly provided that the comptroller's deed, after the lapse of the requisite time, shall be conclusive evidence that "all notices required by law to be given previous to the expiration

of the two years allowed by law to redeem were regular, and regularly given."

The comptroller's deed of 1881 was recorded on the sixth day of April, 1887, while this action was not brought till nearly ten years thereafter. If it be claimed that the statutory limitation of two years did not run during some portion of this period because there were no persons or officers against whom the plaintiff could maintain an action in assertion of his title (a contention which seems to be in direct opposition to the decisions in the case of *People v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498, 145 N. Y. 459), certainly the disability ceased at the expiration of the publication of the comptroller's notice declaring that the state had resumed possession of the lands; for the very foundation of the plaintiff's whole case is the proposition that the statute under which that notice was published authorizes him to bring this suit. The most that could result from the plaintiff's contention, if good, would be that the statutory limit of two years would not commence to run until the publication of the comptroller's notice. But more than two years elapsed between that notice and the commencement of this action.

It is questionable whether as to an owner in actual possession of land the record of a hostile conveyance in the clerk's office is sufficient to set a statute of limitations running against him so as to destroy his title: See remarks of Peckham, J., in *Joslyn v. Rockwell*, 128 N. Y. 334; also, Cooley's *Constitutional Limitations*, 366. The decisions on the subject are in conflict. In *Groesbeck v. Seeley*, 13 Mich. 329, and in *Case v. Dean*, 16 Mich. 12, it was held that, even as to an owner in constructive possession only, a limitation law could not compel him to resort to legal proceedings in defense of his title. A contrary view was taken in *Hill v. Kricke*, 11 ³⁸⁰ Wis. 442, and in *Leffingwell v. Warren*, 2 Black, 599.

In the case before us, as already stated, the plaintiff has not proved any actual possession in himself or in his grantors. If he relies on constructive possession as following the legal title, then such possession ceased with the publication of the comptroller's notice of possession by the state. Here, again, the plaintiff must face the original proposition on which his action is based, that by virtue of the notice the comptroller was placed in either actual or constructive possession. We are, therefore, of opinion that in any view of the case the plaintiff's right to maintain this action was barred after the expiration of two

years from the time of the comptroller's notice. Of this last claim there is further to be said that, in *People v. Turner*, 145 N. Y. 451, this court held, through Gray, J., that by chapter 283 of the Laws of 1885 the people of the state acquired not only constructive, but actual, possession of the lands conveyed to them by the comptroller's deed.

We think the answer of the defendant (for all the facts are pleaded) was sufficient not only to raise the six months' limitation prescribed by the act of 1885, but also the limitation we have discussed.

The judgment of the appellate division should be reversed and the judgment entered on the decision of the trial court affirmed, with costs.

Parker, C. J., Gray, O'Brien, Haight, and Werner, JJ., concur, Landon, J., not sitting.

TAX DEED AS EVIDENCE.—A tax deed cannot be declared by statute to be conclusive as to matters essential to jurisdiction: *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182; *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595. See the extended note to *People v. Cannon*, 36 Am. St. Rep. 682-689, discussing this subject.

LIMITATION OF ACTIONS—VESTED RIGHTS.—The complete bar of the statute of limitations is a vested right, and therefore the legislature cannot authorize the assertion of a claim if such bar has become final: *Board of Education v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348.

CURATIVE TAX LAWS are discussed in the monographic note to *People v. Seymour*, 76 Am. Dec. 527-537. See, also, *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73.

GRAY v. KAUFMAN DAIRY AND ICE CREAM Co.

[162 NEW YORK, 388.]

LANDLORD AND TENANT.—A SURRENDER OF PREMISES is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made: such a surrender is created where the tenant abandons the premises and the landlord relets them in his own name.

LANDLORD AND TENANT—RELETTING PREMISES—ASSENT BY SILENCE.—The consent of a tenant who has abandoned premises to their reletting cannot be implied from a failure to answer a letter from his landlord, stating that he would relet on the tenant's account and hold him responsible for any loss that might be sustained, so as to prevent a surrender by operation of law if the landlord subsequently relets them.

Action to recover two months rent.

David B. Hill, for the appellant.

Jacob F. Miller, for the respondent.

³⁹⁴ WERNER, J. This controversy arises out of the conventional relation of landlord and tenant under circumstances governed by fixed principles of law. The first and most important question in the case is, whether the plaintiff's reletting of the premises described in the lease, after the defendant's attempted surrender of the same, changed or affected the legal status of the parties under the original lease. It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that "a surrender is implied, and so effected by operation of law within the statute, when another ³⁹⁵ estate is created by the reversioner or remainderman with the assent of the termor incompatible with the existing state or term": *Coe v. Hobby*, 72 N. Y. 145, 28 Am. Rep. 120. The existence of this rule has been recognized in this state in *Bedford v. Terhune*, 30 N. Y. 463, 86 Am. Dec. 394, *Smith v. Kerr*, 108 N. Y. 36, 2 Am. St. Rep. 362, *Underhill v. Collins*, 132 N. Y. 271, and in other jurisdictions in *Beall v. White*, 94 U. S. 389, *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416, *Thomas v. Cook*, 2 Barn. & Ald. 119, *Nickells v. Atherstone*, 10 Ad. & E., N. S., 944, *Lyon v. Reed*, 13 Mees. & W. 306, and 1 Washburn on Real Property, 477, 478. It is conceded that defendant's offer of surrender was declined by the plaintiff, and that after the defendant's abandonment of the premises the plaintiff relet the same in his own name to one Mary Ann Keogh for a term of three years and five months. Such a situation, unqualified by other conditions, would create a surrender by operation of law. We must, therefore, ascertain whether the conduct of the parties takes this case out of the operation of this rule.

It is urged by the learned counsel for the plaintiff that the reletting was done with the consent of the defendant under circumstances which bring the case directly within the rule laid down by Judge Haight in *Underhill v. Collins*, 132 N. Y. 270. In that case the landlord and tenant had a conversation a few days before the latter vacated the premises. The

tenant asked the landlord to take the same off his hands. This the landlord declined to do, insisting that he would hold the tenant for the rent and would lease the premises for his benefit. In the case at bar, there was also a conversation before the premises were vacated; but in this conversation there was nothing said about a reletting. The plaintiff simply said that he would hold the defendant for the rent. On the 2d of November, 1893, a day or two after defendant's removal, the plaintiff received the keys of the premises. He returned them with a note stating that he would relet on defendant's account and hold it responsible for any loss that may be sustained. To this note the defendant made no reply. On the 17th of November, 1893, the plaintiff and his son ³⁹⁶ went to Kingston and saw Kaufman and Spore. In the conversation which took place between them and the plaintiff there was no suggestion of reletting. The plaintiff made a demand for the rent which was unpaid, and the defendant made an offer of compromise, under which it agreed to take the cellar of said premises at fifty dollars per month if the plaintiff would cancel the lease as to the store. This offer the plaintiff agreed to consider. On the 27th of November, 1893, the plaintiff wrote to the defendant that he had an offer for the store of fifteen hundred dollars per year to the first of the next ensuing May, and sixteen hundred dollars per year for three years thereafter. He requested the defendant to let him know if it would keep the cellar and pay the difference between the rent fixed by the lease and the amount offered by the intending tenant. To this letter the defendant made no reply. It will be observed from this brief resumé of the facts that there are several distinct features in which this case differs from the Underhill case. In the latter case, there was a personal interview before the tenant had vacated, in which the subject of reletting the premises was discussed. Here the subject of reletting was not mentioned until after the tenant went out, and then the suggestion came in a letter to which the defendant made no reply. Obviously, the only theory upon which defendant can be held to have assented to the reletting of the premises is that by its silence it acquiesced in the act of the plaintiff. We may assume, although we do not decide, that if the communications upon the subject of reletting had been made verbally in the course of conversation between the parties, even after the tenant had vacated the premises, the rule as to agreements by implication laid down in the Underhill case might be held to apply. But here, as we have seen, the

landlord's proposal to relet was in the form of two letters. In the first of these, dated November 3d, he makes the unequivocal assertion that he will let the premises on defendant's account, and will hold it for any loss that may be sustained. Defendant's failure to reply to this letter is followed by a personal interview on the 17th of November, in which there is no reference to a ³⁹⁷ reletting of the premises, and in which defendant's president, after denying any liability for rent, tells the plaintiff to do what he likes with the premises. Then follows the letter of November 27th, informing the defendant of the offer which the plaintiff had received from an intending tenant, and asking defendant if it would pay the difference between the amount offered and the rent reserved in the original lease. It will be observed that, even if we were to give these written communications the same force and effect as verbal statements made in personal interviews between the parties, the facts here are easily differentiated from those in the Underhill case. There the tenant vacated the premises upon the offer of the landlord to relet for his benefit and under such circumstances as to permit the inference that he accepted the offer. Here the landlord's statement to that effect, made after the tenant's abandonment of the premises, is followed by negotiations in which the tenant expresses a willingness to keep the cellar at fifty dollars per month if the landlord will cancel the lease as to the rest of the premises. These steps are succeeded by a communication from the landlord, in which he requests the tenant to decide whether it will keep the cellar and pay the deficit which will arise by an acceptance of the offer which the former then had under consideration. It may well be doubted whether verbal declarations made in personal interviews between the parties, under the circumstances above narrated, would support the plaintiff's theory of this action. To create a contract by implication there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence. But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learned v. Tillotson*, 97 N. Y. 12, 49 Am. Rep. 508, as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to an-

other, ³⁹⁸ which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law." To the same effect are *Bank etc. v. Delafield*, 126 N. Y. 418, and *Thomas v. Gage*, 141 N. Y. 506.

It is manifest, therefore, that the act of the plaintiff in re-letting said premises under the circumstances referred to operated as an acceptance of the defendant's offer to surrender. The judgment herein can be supported upon no theory that is consistent with the established rules of law. As the views above expressed are decisive of the case, it is unnecessary to discuss the other questions raised by the defendant.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

LANDON, J., dissenting. The trial court found as facts that: "Plaintiff refused to accept a surrender of the premises, and did not accept it, and the premises were at no time surrendered to the plaintiff. The letting of the premises was done with the assent of the defendant." The order of affirmance by the appellate division does not state that it was unanimous, but that is not important here, for the record contains evidence tending to support the findings. The evidence tends to show that the defendant intended by its conduct to threaten the plaintiff with the loss of his rent, and thus to coerce him to relet the premises, and then deny its ³⁹⁹ assent, notwithstanding after its receipt of the plaintiff's first letter it told the plaintiff he could do as he liked with the premises. The defendant thus replied to the plaintiff's letter, at least so the trial court, in view of all the circumstances, might find, and did find.

Parker, C. J., Gray, O'Brien, and Haight, JJ., concur with Werner, J., for reversal.

Landon, J., reads dissenting memorandum.

Cullen, J., not sitting.

LANDLORD AND TENANT.—A SURRENDER OF A LEASE by operation of law results from acts which imply mutual consent; and if a landlord resumes possession with the acquiescence of the tenant, or gives a lease to another, or does any act which amounts to an eviction, he will be estopped from disputing the surrender, and a formal surrender will be unnecessary: *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145.

EVIDENCE—OMISSION TO ANSWER LETTER. letter written by one party to a transaction to the other party after the transaction, giving his version of it, and not answered by the other, is not competent in evidence against the latter as an admission: *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508.

LYNDE v. LYNDE.

[162 NEW YORK, 405.]

JURISDICTION OF STATE COURTS.

MARRIAGE AND DIVORCE.—THE DEMAND FOR ALIMONY in a divorce suit is not an essential part of the cause of action, but is merely incidental to the action and the judgment.

MARRIAGE AND DIVORCE—ALIMONY AGAINST NON-RESIDENT DEFENDANT—JURISDICTION BY GENERAL APPEARANCE. an original divorce decree, rendered by a court in another state and void as against a nonresident defendant because rendered without jurisdiction, is properly amended so as to include a judgment for alimony, and the defendant appears generally in the proceedings to amend the decree after notice of such proceedings have been served on him, jurisdiction is obtained over such defendant to render a final decree against him for the payment of alimony.

CONSTITUTIONAL LAW—ENFORCEMENT OF FOREIGN DECREE FOR ALIMONY. final decree of the court of another state, rendered with jurisdiction over the person of the defendant, that the defendant pay a definite sum of money as alimony, establishes a debt of record against him which has extra-territorial value and force, and the courts of another state should give it full credit and effect.

CONSTITUTIONAL LAW—ENFORCING FOREIGN DECREE FOR FUTURE ALIMONY—FULL FAITH AND CREDIT. provision of the federal constitution which requires that full faith and credit shall be given to the judicial proceedings of another states relates to judgments or decrees which are both conclusive in the jurisdiction where rendered and final in their nature; hence a foreign decree for the future payment of alimony, which remains subject to the discretion of the foreign court, lacks that

conclusiveness of character requisite for its enforcement by the courts of another state.

STATUTES—DIVORCE—APPLICATION TO FOREIGN DECREES.—The equitable remedies given by the New York Code of Civil Procedure for the enforcement of a direction for the payment of alimony in a judgment of divorce are applicable only to judgments rendered in New York.

JURISDICTION—ENFORCING FOREIGN DECREE.—The order of a foreign court seeking to carry into execution the final decree of such court by means of equitable remedies is not enforceable in another state.

Action upon a final decree of the court of chancery of New Jersey for the payment of alimony. This decree adjudged that the plaintiff should recover of the defendant seven thousand eight hundred and forty dollars and a counsel fee of one thousand dollars; that the defendant pay to her permanent alimony at the rate of eighty dollars a week from the date of the decree, and that he give security for the payment of the several sums directed by the decree to be paid, and upon his failure to comply with the decree that application might be made for sequestration proceedings, for a receivership, and for an injunction. The complaint also asked to have enforced an order, made subsequently to the final decree, which appointed a receiver and enjoined the defendant from disposing of his property. The trial court granted all the relief asked for. The appellate division modified the judgment, affirming as to the eight thousand eight hundred and forty dollars and reversing as to the remainder. Both parties appeal.

John H. Kemble and George S. Ingraham, for the defendant.

James Westervelt, Henry B. Gayley, and Matthew C. Fleming, for the plaintiff.

412 GRAY, J. I think that the appellate division has very correctly decided the questions in the case and the opinion of Mr. Justice Bartlett, speaking for that court, leaves little, if anything, to be added to its reasoning. With respect to the main question, whether the court of chancery of the state of New Jersey acquired jurisdiction over the defendant to render the final decree for the payment of alimony, it is argued, in his behalf, that the decree of divorce was invalid as to him and, therefore, afforded no support for the decree of alimony. That the decree of divorce was of no force as to him cannot be disputed. It is quite settled, at the present day, that no state can exercise jurisdiction and authority over persons, or prop-

erty, without its territory. Its laws and the judgments of its tribunals can have no extraterritorial operation, except so far as the former may be allowed such by comity. The decree of divorce which the plaintiff obtained in New Jersey was effectual to determine her status as a citizen of that state toward the defendant; but as to him it effected nothing, and was void for want of personal service of process, or of an appearance by him in the divorce proceedings. One or the other of these conditions was required to be shown to enable the court to proceed with jurisdiction in personam. As the service of process was constructive, by publication, however authorized by the laws of the state, it was ineffectual against the defendant for any purpose: *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Matter of Kimball*, 155 N. Y. 62; *Pennoyer v. Neff*, 95 U. S. 714; *Story's Conflict of Laws*, sec. 539.

This action, however, is upon a final decree of the chancery court of New Jersey, which rendered a money judgment in personam against the defendant in a proceeding in which there was a voluntary appearance on his part. Upon service ⁴¹³ of the order of the chancellor, directing him to show cause why the petition of the plaintiff for the amendment of the decree of divorce should not be granted, he appeared in the proceeding, without any reservation of record, and without making any objection to the jurisdiction of the court. Not only was that so, but in his affidavit, which was filed in the proceeding, he asserted that he had been divorced from his matrimonial relations upon the plaintiff's petition; that he had subsequently married again; and his objections to the granting of the plaintiff's petition were carefully formulated. He alleged that "the decree for divorce . . . was purposely drawn without providing for, or reserving any alimony," etc.; that he was "financially unable to pay alimony," and "that the said decree of divorce having been made without reserving the question of alimony, and this defendant having been absolutely divorced from said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable, and unjust to now impose upon him the burden of alimony," etc. In short, he appeared and submitted himself to the jurisdiction of the court, appealing to its consideration of the facts and not objecting to its power to proceed, not repudiating the divorce, but relying upon it. There cannot be the slightest question that his appearance was general. He was represented by counsel, until the order of the chancellor, which

amended the decree of divorce by reserving to the petitioner the right to apply at the foot thereof for alimony and to the court the power to make any further order with respect thereto, had been affirmed by the court of errors and appeals, upon his own appeal, and until the application for a reference to determine the amount of alimony. Is he, then, in a position to invoke the invalidity of the original decree of divorce? As he was not personally served and did not appear in the divorce action, the decree divorcing the plaintiff could not have given her any judgment in personam. It did not reserve the right to apply thereafter for alimony, when jurisdiction in personam was ⁴¹⁴ obtained of the defendant; but that was an unintentional omission, as the chancellor decided, which was due to the inadvertence of plaintiff's counsel and would be remedied by amending the decree. The affirmance of the order in that respect, on defendant's appeal, settled the law of that state to be that the court may, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it: *Lynde v. Lynde*, 54 N. J. Eq. 473. The demand for alimony in a divorce suit is not an essential part of the cause of action; but is merely incidental to the action and the judgment: *Forrest v. Forrest*, 25 N. Y. 501; *Galusha v. Galusha*, 138 N. Y. 272, 281; *Lynde v. Lynde*, 54 N. J. Eq. 473. In *Kamp v. Kamp*, 59 N. Y. 212, the question was not up as to whether the court might amend its judgment granting divorce, simpliciter, when the omission to reserve the question of alimony was shown to have been through inadvertence. The application there was for an order directing the payment of alimony, upon a judgment of divorce which was silent as to alimony, and it was held that the power to allow it in subsequent proceedings does not exist, in view of the legal presumption that the judgment had finally decided every question involved in the action, which would include the right of the plaintiff to claim alimony.

In my opinion, assuming, as we must, that the decree of the chancery court, which amended the original decree of divorce, expressed the law of the state of New Jersey (*Laing v. Rigney*, 160 U. S. 542), jurisdiction was obtained over the defendant by his appearance, plea, and submission, to so far cure the invalidity of the divorce decree as to render it effective as a basis for alimony proceedings. But whether its invalidity was cured,

or not, in the subsequent proceeding to which the defendant was a party, a final decree was entered adjudging that he pay to the plaintiff a certain sum of money. The jurisdiction, once obtained, could not be divested by his refusal to appear in the later stages of the ⁴¹⁵ proceeding. He cannot now attack the final decree of the court collaterally, after having had his day in court. In *Laing v. Rigney*, 160 U. S. 542, after the wife had filed a bill against her husband in the court of chancery in the state of New Jersey, alleging acts of adultery, and the defendant had appeared and answered denying the allegations, the plaintiff filed a supplemental bill, wherein she alleged that the defendant had committed adultery with a person named since the commencement of the suit, and prayed that she might have the same relief against the defendant as she might if the facts had been stated in the original bill. Process upon the supplemental bill could not be served personally upon the defendant, who was a nonresident, and there was a substituted service by publication. He filed no answer to the supplemental bill nor did he appear, and a final decree was rendered by the chancellor granting the divorce and awarding alimony, etc. An action was then brought in this state by the wife upon the decree, to recover against her husband the amount awarded for alimony and costs, and the question was whether the New Jersey court had jurisdiction to render the decree. In the supreme court of the United States, to which the case was taken from this court (*Rigney v. Rigney*, 127 N. Y. 408, 24 Am. St. Rep. 462) by writ of error, it was held that, in affirming the dismissal of the plaintiff's complaint upon the trial, due effect had not been given to the provisions of article 4 of the constitution of the United States, which require that full faith and credit shall be given in each state to the judicial proceedings of every other state. It was conceded that if the judgment of the court of chancery was not binding upon the defendant therein, personally, in that state, no such force could be given to it in the state of New York; but it was held that the law of the state of New Jersey must be deemed to be as declared by the chancellor, who had rendered a final decree, based upon the original bill, the process under which had been served upon the defendant within the state, and upon the supplemental bill, a copy of which, with the rule to plead, had been served upon the defendant without the state. It was said that "so long as ⁴¹⁶ this decree stands, it must be deemed to express the law of the state. If the defendant deemed himself aggrieved there-

by, his remedy was by appeal." In other words, the supreme court of the United States held that the New Jersey court having once acquired jurisdiction of the defendant in the action, whether it retained that jurisdiction so as to render the final decree in the proceedings leading thereto was a question depending upon the law of that state, which could not be attacked collaterally.

Laing v. Rigney, 160 U. S. 542, is much in point, inasmuch as jurisdiction of the defendant in this case having been obtained in the proceeding, it was retained by the court until it made the final decree. The jurisdiction conferred the power to render the decree, and it will be regarded as valid and binding until set aside in the court in which it was rendered: *Kinnier v. Kinnier*, 45 N. Y. 542, 6 Am. Rep. 132.

Ward v. Boyce, 152 N. Y. 191, has no application. The action was upon a promissory note, made by the defendant to the plaintiff's order, and the issue between the parties was as to the plaintiff's ownership. The defendant claimed that the record of a certain proceeding in a justice's court, in the state of Vermont, was conclusive evidence that the note was not her property, but was that of her husband. The proceeding in the Vermont court was by way of trustee process and was instituted by a creditor of Mr. Ward, this plaintiff's husband, against him and Boyce, the maker of the note, as his debtor. Ward was a nonresident, did not appear, and judgment went against him by default. Boyce, the other defendant, appeared and stated that he gave the note to Mrs. Ward for cattle purchased and he asked that she be cited to appear. A citation was served upon her in the state of Vermont to show cause why the note should not be adjudged to be held as her husband's property by his creditor. She did not appear and judgment was rendered in conformity with the terms of the citation. We held that the judgment did not conclude Mrs. Ward, because she was not a party to the proceeding and was cited to appear at a stage of it when she had no opportunity ⁴¹⁷ to litigate the fundamental issue. The principal fact had then been adjudged that the indebtedness for the cattle, for which the note was given, was owing to the husband; and this in a special statutory proceeding, in which the court had acquired no jurisdiction by service of any process upon him or upon his wife, who held the note. When she was cited it was not that she might contest the validity of the judgment against her husband, but merely to show cause why the note she held should

not be adjudged as her husband's property and to be held by his creditor. I can perceive no resemblance in the principle of the decision in *Ward v. Boyce*, 152 N. Y. 191, to that involved here.

I am satisfied, without further discussion, that the court of chancery in New Jersey had ample jurisdiction to render the final decree now in question against the defendant.

With respect to how far the supreme court of this state will enforce the final decree of the New Jersey court, I think the determination of the appellate division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and therefore it had extraterritorial value and force: Wharton on Conflict of Laws, sec. 804. As a debt of record against the defendant the courts of this state should give it full credit and effect, but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the federal constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies which the prevailing party may be entitled to in New Jersey and which the subsequent order gave to her.

So far as it made provision for the payment of alimony in **418** the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in *Lynde v. Lynde*, 54 N. J. Eq. 473, referring to the law of New Jersey: "The statute exhibits an intention that the subject shall be continuously dealt with according to the varying condition and circumstances of the party." The provision of the federal constitution, which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt or other obligation against a party, the record is available in other jurisdictions as a foundation for a judgment there.

The provisions of our code for the enforcement of a direction in a judgment of divorce for the payment of alimony by equitable remedies, pertain only to such judgments as are recovered here: Code, art. 4, c. 15. The jurisdiction of the supreme court of this state to dissolve a marriage is conferred solely by statute and its provisions upon the subject of alimony are not available to the plaintiff in aid of her decree.

The plaintiff's decree was, therefore, available to her as evidence in this action that the subject matter of the proceedings leading to its rendition, viz., the liability for alimony, had become a debt of record in the state of New Jersey, which could not be avoided but by plea of nul tiel record: *M'Elmoyle v. Cohen*, 13 Pet. 312, 324.

The case of *Barber v. Barber*, 21 How. 582, cited by the plaintiff in support of her claim that the decree of the New Jersey court should be enforced in all its parts, was not parallel in its facts, and the observations of Justice Wayne, which are referred to, if intended as supposed, were not necessary to the decision of the particular question. In that case the wife had obtained a judgment of divorce from her husband in the court of chancery of this state and the final ⁴¹⁹ decree awarded her a sum of money representing alimony retrospectively due to her for the interval between the filing of the bill and the rendition of the decree, directed execution therefor, and, further, ordered the payment of permanent alimony in the future during her life in quarterly payments, which was "vested in her for her own and separate use and as her own and separate estate, with full power to invest the same, . . . to dispose of the same by will or otherwise from time to time during her life, or at her death," etc. The husband then left this state and went to Wisconsin. A bill was filed there in the United States court by the wife, through her next friend, setting forth the proceedings had in the New York court and the decree, charging the husband with not having paid any part of the alimony adjudged to his wife, and alleging that there was then due to her a certain amount of money on that account. In his answer he admitted the rendering of a decree of divorce after contestation, and that by it he "was subjected to the payment of alimony to the extent and in the way it is claimed in the bill," and alleged that as he had obtained a divorce from his wife in Wisconsin, she thereby "became a feme sole, and being so could not sue by her next friend," etc. The action resulted

in a decree, adjudging that a stated amount of money "is due from the defendant upon the alimony sued for," and, upon his default in payment, ordering execution therefor. It will be observed that the situation of the parties was quite other than it is here, that the decree of the New York court was the basis of a bill in equity in the federal court, and that its finality as an adjudication with respect to alimony, past due and in the future (in which latter respect it was made a vested estate in her for life), was admitted by the answer to the bill. It will also be observed that the decree obtained in the United States court in Wisconsin merely adjudged a certain amount to be due complainant which the defendant must pay. The question in the case was stated to be whether the wife might sue in another state "by her next friend, in equity, in a court of the United States, to carry into judgment the decree," and much of the ⁴²⁰ discussion proceeded upon the jurisdiction in equity. As to the nature of a decree which awards alimony, it was remarked in the course of the opinion that when the court, having jurisdiction of the wife's suit for divorce, allows her alimony, "it becomes a judicial debt of record against the husband." As Mr. Justice Bartlett very correctly suggests in his examination of *Barber v. Barber*, 21 How. 582, Mr. Justice Wayne, when he further observed in his opinion that the wife might sue her husband in another jurisdiction "to carry the decree into a judgment there with the same effect that it had in the state in which the decree was given," could not have intended that she could carry with her judgment into another state the right to any particular remedies for its enforcement; because that would have been in conflict with the rule which he had laid down many years earlier in *M'Elmoyle v. Cohen*, 13 Pet. 312, 324.

So far, therefore, as the final decree of the court in New Jersey adjudged moneys to be due and payable to the plaintiff from the defendant, it became a judicial debt of record, which the former was entitled to have enforced by the courts of this state under the provisions of the federal constitution, and a judgment recovered thereupon could be executed only as our laws permit (*Barber v. Barber*, 21 How. 582), which would not include the particular equitable remedies provided by the statute in the chapter on matrimonial actions. So far as the plaintiff's decree provided for methods to enforce payment, its provisions were in the nature of execution, and operative upon the defendant only as he or property belong-

ing to him might be found within the jurisdiction of the courts of New Jersey.

The subsequent order, dated February 8, 1898, and which is set out in the complaint (but referred to as of March 24, 1898), is not enforceable here; for it was merely an order which sought to carry the final decree into execution within the state by the equitable remedies of a receivership and of an injunction. No action will lie upon such an order: *Sheehy v. Professional Life Assur. Co.*, 2 Com. B., N. S., 256.

I advise an affirmance of the judgment, without costs.

421 LANDON, J. I concur in the opinion of Gray, J., in overruling the defendant's appeal. I would go further and sustain the plaintiff's appeal. The plaintiff seeks such equitable judgment in this state as shall give full faith, credit, and effect to a decree of the court of chancery of New Jersey awarding her alimony against her husband. The case embraces a federal question, and the decisions of the United States supreme court become authoritative so far as they are applicable. The question is not whether the jurisdiction of the courts of this state to grant alimony is equitable or statutory, but whether a plaintiff who has obtained a decree for alimony in another state can in an equitable action in this state, upon sufficient allegations and proofs, not only obtain judgment upon such foreign decree, but also such means of enforcing it as are suited to periodical payments and the peculiar duty incumbent upon the husband in respect of alimony, which means equity alone can give. *Barber v. Barber*, 21 How. 582, holds that equity has jurisdiction in such a case. In *Wood v. Wood*, 7 Misc. Rep. 579, the court refused to follow the decision, and the appellate division has adopted the refusal. But the case there was upon a French decree, and no federal question existed, and the court was not bound by the authority of *Barber v. Barber*, 21 How. 582. It is otherwise here. If equity has jurisdiction, then it can adapt its remedies to the exigencies of the case. This the special term did, and I think did right.

Parker, C. J., Haight, and Werner, JJ., concur.

Landon, J., concurs in memorandum.

O'Brien, J., not voting.

Cullen, J., not sitting.

THE JURISDICTION OF STATE COURTS is limited by state lines: *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587; and a legislature has no power to authorize a court to exercise extraterritorial jurisdiction: *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169.

A JUDGMENT FOR ALIMONY is a debt of record as much as any other judgment for money is: *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679.

IF A FOREIGN DECREE FOR ALIMONY has the effect of a judgment at law in the state wherein it was rendered, an action at law may be maintained thereon in another state: *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857.

FOREIGN DECREES OF DIVORCE are discussed in the monographic note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182-184.

RODGERS v. CLEMENT.

[162 NEW YORK, 422.]

PARTNERSHIP—RIGHT OF PARTNER TO INTEREST ON ADVANCES.—A partner may loan money to the firm of which he is a member and receive interest therefor, and in such cases interest is allowed on the advances even in the absence of an express agreement by the firm to pay it if there is no agreement to the contrary, express or implied.

APPEAL—PRESUMPTION TO SUPPORT FINDINGS.—The rule that it is presumed on appeal that a referee found every fact necessary to support the judgment prevails only when the finding was within the scope of the pleadings and the evidence; hence a finding that a claim made by a partner for interest on advances of money to and for the use of a firm is disallowed because there was no agreement that such interest should be paid, and that the right to interest does not exist in the absence of an agreement, is not a finding that the money advanced was capital, but is rather a finding that it was a loan, where the complaint alleges that the plaintiff made loans to the firm, and the defendant denies the allegations and then admits them and alleges that the loans were paid.

David B. Hill, L. Lafin Kellogg, and Alfred C. Petté, for the appellant.

F. R. Minrath, for the respondent.

⁴²⁴ O'BRIEN, J. This was an action for an accounting between partners. In the year 1887 the plaintiff and defendant formed a partnership by agreement without writing, the purpose of which was to obtain and execute contracts for the construction of public works as might be mutually agreed upon from time to time, the partnership to continue until the contracts procured or taken by the firm had been completed or performed. The profits and losses of the business were to be

equally divided between the parties. Under this arrangement the firm procured contracts to construct various public works in this and in other states, which contracts were executed and performed prior to the commencement of this action. This suit was made necessary on account of differences which had arisen with respect to the division of the firm assets and the settlement of the partnership affairs. The cause was tried before a referee, who, after stating the account, found a balance ⁴²⁵ due to the defendant, including interest to April 20, 1896, the date of the report, amounting in the aggregate to four thousand nine hundred and twenty-eight dollars and sixty-six cents, and judgment was entered accordingly. On appeal by the plaintiff the appellate division held that the judgment in defendant's favor was excessive in the sum of eight hundred and ninety-seven dollars and fifty-two cents, and ordered a new trial unless the defendant should stipulate to reduce the judgment by that amount. The stipulation was given, the judgment so modified, and the plaintiff appeals to this court.

The appeal presents but a single question, and that is the right of the plaintiff to be credited with an item of five thousand nine hundred and ninety-seven dollars and sixty-six cents, which represents the interest upon certain moneys advanced by him for the use of the firm while it was engaged in the execution of a contract for the construction of a railroad. The referee refused to allow this item and was sustained in this ruling by the court below on appeal. The counsel seem to be in substantial accord with respect to the principles of law applicable to such a question. If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed: *Johnson v. Hartshorne*, 52 N. Y. 173; *Jackson v. Johnson*, 11 Hun. 509; *Jackson v. Johnson*, 74 N. Y. 607; *Sandford v. Barney*, 50 Hun, 108; *In re James*, 146 N. Y. 106, 48 Am. St. Rep. 774; *Cheever v. Lamar*, 19 Hun, 130; *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Collyer on Partnership*, sec. 318; *Lindley on Partnership*, 389.

But, on the other hand, if the moneys so paid or advanced by the plaintiff for the use of the firm were in fact loans, and the plaintiff as to such advances was a creditor of the firm, he stands upon the same footing as any other creditor with respect

to the right to be allowed interest upon the accounting. A partner may loan money to the firm of which he is a member, and when he does his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although ⁴²⁶ there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest or an agreement to pay or allow it is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other: *Reid v. Rensselaer Glass Factory*, 3 Cow. 399, 436, 437; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Liotard v. Graves*, 3 Caines, 243; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Foley v. Foley*, 15 App. Div. 276; *Chester v. Jumel*, 125 N. Y. 237; *Lloyd v. Carrier*, 2 Lans. 364; *Beach v. Colles*, 85 N. Y. 515; *Collender v. Phelan*, 79 N. Y. 366; *Morris v. Allen*, 14 N. J. Eq. 44; *Baker v. Mayo*, 129 Mass. 517; *In re German Min. Co.*, 4 De Gex, M. & G. 19, 35; 1 *Lindley on Partnership*, 390; *In re Norwich Yarn Co.*, 22 Beav. 143, 168; *Troup's Case*, 29 Beav. 353; *In re Beulah Park Estate*, L. R. 15 Eq. 43; *Hodges v. Parker*, 17 Vt. 242, 44 Am. Dec. 331; *Ligare v. Peacock*, 109 Ill. 94; *Matthews v. Adams*, 84 Md. 143; *Woerz v. Schumacher*, 161 N. Y. 530.

When the money has been paid in as capital, or where there is an express agreement between the parties that interest is not to be allowed or charged, this rule, of course, has no application. So the plaintiff's right to the item of interest must depend upon the fact that the money was a loan to the firm and not a contribution to capital, and we must resort to the findings of the referee for the fact. The only finding in the report that bears upon the question is in the following words: "The claim made by plaintiff for interest on his advances of money to, and for the use of, the firm is disallowed, for the reason that, as a matter of fact, there was no agreement, either express or implied, that such interest should be paid or allowed, and, under the circumstances of the case, the right to interest does not exist as matter of law in the absence of such an agreement." It is not quite clear whether this language was used by the learned referee to express the idea of a loan or a contribution to capital, although the words "advances of money to and for the use of the firm" are more appropriate to describe a loan than a payment of capital: *Snyder v.* ⁴²⁷ *Lindsey*, 157 N. Y. 616. While the language is open to con-

struction, it would be quite unreasonable to hold that it imports a finding that the money advanced was capital and not a loan to the firm. It is claimed by the learned counsel for the defendant that the decision upon the appeal below conclusively establishes the fact, so far as this court is concerned, that the money advanced was capital and not a loan. The court upon appeal could not settle that fact unless it had been found by the trial court, and the referee did not, in terms at least, make any such finding. The order of the learned court below is in the following words: "It is hereby ordered and adjudged that the judgment so appealed from be, and the same is hereby, reversed and a new trial granted, costs to abide the event, unless within twenty days defendant stipulates to reduce his recovery by deducting therefrom eight hundred and ninety-seven dollars and fifty-two cents, in which event the judgment so reduced is affirmed, without costs, and in such case the court unanimously decided that the findings of fact as modified as aforesaid are supported by the evidence." We do not perceive how this order can conclude the plaintiff in this court upon the question of interest, since that question is one of law arising upon the facts found. The inquiry now is, What has the referee found? Has he found that the money advanced was capital or has he found that it was a loan? On this vital question the order of the learned court below reflects no light. But it is said that this court must in such a case as this presume that the referee found every fact necessary to support the judgment, although such fact is not expressly stated in the report. That proposition is doubtless correct, providing the necessary finding was within the scope of the pleadings and the evidence: *Amherst College v. Ritch*, 151 N. Y. 282. But we are not required to presume that the referee found facts against the evidence or against the admissions of the pleadings, and in order to give construction to the language of the referee in the finding referred to, we may properly look into the pleadings in order to see what was the attitude of the parties at the trial. Not only is the answer silent with respect to any claim by the defendant that ⁴²⁸ the advances were capital, but under a fair construction the fact that they were loans seems to be admitted. The complaint distinctly alleged "that the plaintiff has, at various times, loaned to the said copartnership large sums of money, which have not yet been repaid." This allegation cannot fairly be limited to any particular advance or transaction, but is broad enough to include all advances made by the plaintiff

to the firm during the existence of the partnership, and it is stated that these advances were loans. If the fact thus alleged has not been controverted, it must be taken as admitted. The answer of the defendant to this allegation is as follows: "The defendant denies the allegations of the seventh paragraph of the complaint, but admits that the plaintiff did loan to the said copartnership certain sums of money, all of which were repaid to him." It will be seen that this allegation of the answer contains a denial, an admission, and an affirmative averment. It is a settled rule in the construction of pleadings that a material fact distinctly alleged in the complaint is not controverted by stating the same fact in the answer in some other way or by giving a version of the transaction inconsistent with the allegation in the complaint. The allegations of the complaint are controverted or put in issue only by a general or specific denial. A material fact alleged is not controverted or put in issue by a statement inconsistent with the facts, or from which a denial may be implied or inferred: *Fleischman v. Stern*, 90 N. Y. 110; *Marston v. Swett*, 66 N. Y. 210, 23 Am. Rep. 43; *Wood v. Whiting*, 21 Barb. 190; *West v. American Exch. Bank*, 44 Barb. 175. The material fact alleged in the complaint in this case was that the plaintiff had made loans of money to the firm. This allegation was not met by either a general or specific denial, but by a statement in a single sentence, which, when properly interpreted, amounts to an affirmative plea of payment. The pleader first denies the allegations of the complaint, then admits them and alleges that the loans were paid.

The findings of the learned referee, when read with the pleadings, should therefore be construed as importing a loan ⁴²⁹ to the firm and not a contribution to capital. If the words "advances of money to and for the use of the firm" are in themselves ambiguous, they are made quite certain by the condition of the pleadings, and hence it is reasonable to conclude that the referee did not find that the money advanced was capital, but did find that it was a loan to the firm. The real character of the various transactions having thus been established as matter of fact by the findings, nothing remains but to apply the law to the fact found. We think that the refusal of the referee to allow interest to the plaintiff on the sums loaned by him to the firm was error, and the judgment must therefore be reversed and a new trial granted, costs to abide the final award of costs in the action.

Parker, C. J., Haight and Werner, JJ., *concur*.

Gray and Landon, JJ., *dissent*.

Cullen, J., *not sitting*.

INTEREST.—A PARTNER who has advanced money to the firm is entitled to interest from the time of the advancement: *Hodges v. Parker*, 17 Vt. 242, 44 Am. Dec. 331. See, further, the extended note to *Holden v. Peace*, 45 Am. Dec. 518-520.

REFEREE, FINDINGS OF.—IT WILL BE PRESUMED by a courts of appeals that the referee found such facts in addition to those specified in his report as are essential to sustain his conclusion, provided there was evidence to warrant the finding of such additional facts: *Valentine v. Conner*, 40 N. Y. 248, 100 Am. Dec. 476.

CARNEY v. NEW YORK LIFE INSURANCE COMPANY.

[162 NEW YORK, 453.]

CORPORATIONS—CONTRACT TO EMPLOY FOR LIFE—VALIDITY.—A contract to employ a physician for life made by the president and actuary of a life insurance company, under a by-law empowering them "to appoint, remove, and fix the compensation of each and every person except agents employed by the company," is unreasonable and not contemplated by the by-law, since the term of office of the trustees who adopted the by-law is limited by statute, and it must be assumed that they would not adopt a by-law which would interfere with the power of future boards of trustees by imposing on them unreasonable contracts.

James D. Fessenden, for the appellant.

William B. Hornblower and George W. Hubbell, for the respondent.

454 HAIGHT, J. The action was brought to recover damages for a breach of contract of employment.

The plaintiff's counsel, in his opening, repeated the allegations of his complaint, which were, in substance, that in December, 1869, the president and actuary of the defendant entered into an oral contract with the plaintiff, by the terms of which he was to enter the employment of the defendant in a medical capacity, and that such employment should continue during his life; that for the first year his salary should be five thousand dollars, the second year five thousand five hundred dollars, and the third year six thousand dollars, and that it was to remain at that figure until changed by the parties; that

pursuant to such contract he entered the employment of the defendant, which continued until the year 1895, with a salary which was increased from time to time until it reached twelve thousand dollars per annum, and that on the twentieth day of June, 1895, he was wrongfully discharged. The complaint further alleged that the board of trustees had adopted a by-law which was in force at the time of the making of the contract in 1869, by which the president and actuary were empowered "to appoint, remove, and fix the compensation of each and every person except agents employed by the company." He demanded as damages one hundred and sixty-eight thousand dollars. The answer denied that the contract was for life, and alleged that it was void.

It is claimed that the alleged contract was void under the statute of frauds, and, further, that it was a contract which neither the executive officers nor the board of trustees had the power to make under the authority of *Beers v. New York etc. Ins. Co.*, 66 Hun, 75; but, passing without determining these questions, we are of the opinion that the plaintiff has no cause of action, for other reasons which may be briefly stated.

The by-law alluded to must be given a reasonable interpretation. We may assume that the power given to appoint was intended to include the power to employ and to agree upon 455 the compensation that should be paid, but, in assuming this, we cannot believe that the board of trustees, in adopting the by-law, intended to invest the executive officers named with the power to enter into unreasonable contracts as to the term of employment. Under the statute, the board of trustees consisted of twenty individuals whose terms of office continued for four years, five being elected each year. The management and control of the corporation was given to the trustees. In construing the action of the board in adopting the by-law in question we must assume that they had in mind the provisions of the statute fixing their terms of office and that, at the expiration of that period, other persons may be chosen in their places, upon whom would rest the responsibility of the conduct and management of the business of the company, and that they had no right to interfere with the powers of future boards of trustees by imposing upon them unreasonable contracts. This provision of the statute may properly be taken into consideration by the court in determining whether the contract is reasonable. Having in view the provisions for the election of new officers upon whom would

be cast the responsibility of the management of the company, and the evident purpose of the statute that the hands of the future officers should not be tied or their action unreasonably hampered, we think the contract in question must be held to be unreasonable and one not contemplated by the by-law, and consequently, one that should not be executed. In this case there is no dispute as to the facts, and, consequently, the questions arising with reference to the meaning of the by-law, and, as to whether the contract is reasonable, are for the court and not for the jury: *Wright v. Bank of Metropolis*, 110 N. Y. 237, 249, 6 Am. St. Rep. 356; *Mead v. Parker*, 111 N. Y. 259, 262; *Sullivan v. New York etc. Cement Co.*, 119 N. Y. 348, 355; *Colt v. Owens*, 90 N. Y. 368.

The judgment should be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Martin, Vann, and Landon, JJ., concur.

CONTRACTS FOR SERVICE—LEGALITY OF.—A contract to serve for life is not illegal: See note to *Pennsylvania Co. v. Dolan*, 51 Am. St. Rep. 302. A contract may be made by a municipality extending beyond the official term of the officers who authorize it, if just, reasonable, and prompted by the necessities of the situation: *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191.

SQUIER v. HANOVER FIRE INSURANCE COMPANY.

[162 NEW YORK, 552.]

INSURANCE—ORAL CONTRACT TO RENEW POLICY.—Where insurance agents, authorized "to countersign, issue, and renew policies of insurance," agree orally to continue an existing contract of insurance and issue a renewal or policy therefor, the insurer is bound, although credit was given for the renewal premium.

WITNESSES — CROSS-EXAMINATION — ATTACKING CREDIBILITY.—Where an insurance company, through its agents, takes the position that a policy has lapsed before the loss occurred, the insured may, for the purpose of attacking the credibility of the insurance agents, ask them on cross-examination whether they had not stated to third parties after the fire that they thought the loss would be paid and that the insured would not lose the amount, and, in case of their denial, the insured may show that they had made such statements.

Horace McGuire, for the appellant.

A. C. Wade, for the respondent.

554 BARTLETT, J. As the judgment for plaintiff was unanimously affirmed by the appellate division, the facts are conclusively settled in her favor.

The Hanover Fire Insurance Company in 1893 was represented at Jamestown, New York, by its agents, Horton Brothers, who issued a policy to the plaintiff, dated December 20, 1893, insuring certain personal property for the term of one year. The property was destroyed by fire on the twenty-ninth day of December, 1894. The plaintiff's contention is, that the policy was duly renewed prior to its expiration, December 20, 1894; the defendant insists the policy expired on the last-named date.

The jury have necessarily found that a verbal contract, renewing the policy for another year, was made between the plaintiff's husband, acting as her agent, and one of the firm of Horton Brothers about ten days before expiration; that plaintiff was to pay premium in not more than thirty days and call and get policy.

The learned counsel for the defendant raises his first question of law, based on this finding of fact, to the effect that the agents of the company had no authority to make a verbal contract to continue a risk beyond the expiration date.

The defendant read in evidence the certificate of appointment making Horton Brothers its agents at Jamestown, and among other powers therein conferred was "to countersign, issue, and renew policies of insurance."

The oral contract is the ordinary and usual agreement which an insurance agent makes on the eve of a policy expiring that **555** he will renew it. The question in this case is not whether the agent can enter into a parol contract of insurance that will bind the principal, but, rather, having agreed orally to continue an existing contract of insurance and issue a renewal or policy therefor, the defendant is bound thereby.

This court considered the question in *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, and held the parol contract valid. In a later case (*Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322) the authority cited was followed, and it was further held that the payment of premium, at the time of the oral agreement, is not necessary to make the contract binding on the company; if a credit be given by the agent it is equally obligatory: *Trustees etc. v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

In *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674, this court, in the second division, upheld the oral agreement from the date of the conversation: See, also, the recent case of *Hicks v. British American Assur. Co.*, 162 N. Y. 284.

The matter of parol agreement by a local insurance agent was quite recently before this court in a case involving the oral promise of the agent made with the transferee of the property and policy to go where the latter was kept by a third person and make the required indorsement. The agent failed to keep his promise, a fire occurred, and it was held that the transferee could recover from the company the amount of the insurance as damages for the breach of such oral agreement: *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 56 Am. St. Rep. 600. The line of cases cited was there approved.

In the case at bar, it follows that the oral agreement of defendant's agents to renew plaintiff's insurance was a contract they were legally competent to make, and the recovery thereon must be sustained.

The defendant further insists, however, that there was legal error in allowing, over its objection and exception, certain questions to be propounded to the agents, Horton Brothers, on cross-examination, whereby it was sought to lay the foundation for their collateral impeachment.

556 Charles L. Horton was asked if he knew Charles H. Wickes, a real estate man residing in Jamestown, and whether he had a talk with him about the fire a week or ten days after it occurred. The witness stated that he knew Wickes, but recalled no conversation. This question was then put to him: "Q. Did he ask you, referring to this fire, if they were settling with Squier's people for their loss, or that in substance, and did you reply that you had written the adjuster and you thought when he got here the loss would be settled and paid, or that in substance? A. I did not."

Plaintiff placed Wickes on the stand, who stated that he knew Horton and had a talk with him about the fire. This question was put to him: "Q. And did you ask him if they, the insurance company, were settling with Squier's people for their loss, or that in substance, and did he reply that he had written the adjuster and he thought that when he got there the loss would be settled and paid, or that in substance? A. He did."

Walter B. Horton, the other member of the firm of Horton Brothers, when under cross-examination, was asked this question: "Q. In that conversation did you say or did Mr. Rich say to you in the presence of Mr. Wells, 'It is a hard blow for Mr. Squier or Mrs. Squier,' and ask you if he had got to lose this amount, and did you reply, in substance, that you thought not, that you thought you could get it for him? A. What you said I didn't say at all. The substance is different. I didn't say that in substance."

Wells was placed upon the stand, and, on being duly questioned, testified that Walter B. Horton stated to him substantially that which is embodied in the above question. The defendant's counsel objected to the question asked Charles L. Horton, on the ground that it was incompetent, immaterial, and "any declaration made by this witness that an adjuster would come or pay a loss if the company was not liable for a loss would not bind the company." The same objection, in substance, was interposed to the question asked Walter B. Horton.

557 It is very clear, from the form of these objections, that the counsel for the defendant misapprehended the object of asking these questions. The oral contract had been proved by plaintiff's counsel when the case was with him, and he now sought, not to adduce additional evidence as to the making of the contract, but to lay the foundation for proving that the agents had, in conversations subsequent to the fire, made statements as to facts involved within the issues wholly inconsistent with the position assumed by them in defending this action and as witnesses at the trial.

The rule is well settled that a witness may be asked on his cross-examination, with a view to his credibility, whether he has not made statements touching a material issue in the cause at variance with his testimony in chief, and, if he denies having made such statements, the party against whom he is called may show, by other witnesses, that he did make them: *Patchin v. Astor Mut. Ins. Co.*, 13 N. Y. 268; *Schell v. Plumb*, 55 N. Y. 592; *People v. Schuyler*, 106 N. Y. 298; 1 *Greenleaf on Evidence*, 16th ed., secs. 461f, 462, et seq.

Applying this rule to the facts in the case at bar, it is clear that the questions asked Horton Brothers under cross-examination bore strongly upon their credibility by showing declarations made by them after the fire at variance with their evidence at the trial and their general position as agents of the defendant.

We have this situation: The plaintiff insisting the policy of insurance was seasonably renewed, and the defendant asserting, through its agents, that the risk on the property terminated by lapse of time nine days before the fire.

In other words, at the time the property was destroyed, the defendant company rested under no legal obligation to pay the loss, and the plaintiff might have, with equal propriety, sued any other insurance company in the state of New York.

This being so, there was but one position that Horton Brothers, the agents of the company, could consistently assume and maintain, to wit, the positive denial of liability. It was, however, established by disinterested witnesses at the ⁵⁵⁸ trial, after the foundation had been duly laid for the evidence and the attention of Horton Brothers sharply called to the precise point involved, that Charles L. Horton said shortly after the fire that he had written the adjuster and thought when he got there the loss would be adjusted and paid.

Walter B. Horton, under like circumstances, stated that he did not think plaintiff would lose the amount, and that he thought he could get it for her.

These statements were inconsistent with the position of no liability on the part of the defendant, and, if the jury believed the disinterested witnesses who swore to them, they were justified, in the exercise of their honest judgment, in rejecting the entire evidence of Horton Brothers.

The judgment appealed from should be affirmed, with costs.

Parker, C. J., Martin, Vann, Cullen, and Werner, JJ., concur.

Gray, J., not voting.

INSURANCE—ORAL RENEWAL.—If an insurer makes an oral offer through his authorized agent to renew a policy of insurance, and the offer is accepted, this constitutes a contract binding on both the parties: See extended note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 152.

WITNESSES—CROSS-EXAMINATION.—If a witness testifies to a particular state of facts, he may be asked on cross-examination whether he did not on a prior occasion testify to a certain state of facts; and if he answers that he does not recollect, his testimony given on such prior occasion may be introduced in evidence to show that he did so testify: *Consolidated Ice-machine Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WALSH v. BARRON.

[61 OHIO STATE, 15.]

MUNICIPAL CORPORATIONS—ASSESSMENT FOR STREET IMPROVEMENT EXCEEDING BENEFITS CONFERRED.—An assessment made by a city for the improvement of a street, being sustainable only on the theory of special benefits conferred on the land assessed by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred.

MUNICIPAL CORPORATIONS.—ASSESSMENT FOR STREET IMPROVEMENT IN EXCESS of the value of the property with the benefits added by the improvement amounts to a taking of private property for public use without compensation, and hence cannot be enforced.

MUNICIPAL CORPORATIONS—ASSESSMENT FOR STREET IMPROVEMENT—LIMITATION UPON.—An assessment for the improvement of a street must be restricted to the special benefits conferred upon the property assessed, as distinguished from those common to the public, although a limitation of the general law of the state, confining assessments to twenty-five per cent of the value of the property as returned for taxation, has been removed by an amendment to such statute.

Action commenced by Barron, treasurer, for the collection of certain taxes and assessments imposed upon the property of Walsh, in Columbus, a city of the first grade, second class. There was a judgment for the plaintiff, and the defendant sued out a writ of error.

C. T. Clark, for the plaintiff in error.

Dyer & Williams and Crum, Irvine & Pretzman, for the defendant in error.

²³ MINSHALL, J. The question in this case relates to the validity of an assessment made upon property for the cost of an improvement. From the averments of his answer and cross-petition it appears that the assessment made upon each lot of Walsh is in excess of its entire value. That each lot would not before, or since, the improvement, have sold for enough to pay the assessment upon it. That they have, in fact, been offered and returned not sold and forfeited to the state. He in no way promoted the proceeding and is not, therefore, precluded from ²⁴ making the question as to the validity of the assessment.

Upon the admitted averments of the pleading the naked question here presented is, whether an assessment may be made upon the property of an owner for the cost of a public improvement that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement. We do not think this can be done where the party complaining in no way promoted the improvement. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases and the most reliable authorities, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted without impairing the inviolability of private property guaranteed by the constitution, or in other, if not more appropriate, words, confiscating it.

In a recent case decided by the supreme court of the United States, *Norwood v. Baker*, 172 U. S. 269, 279, it said in the opinion: "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over specific benefits, unless it ²⁵ be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Judge Dillon, after referring to the earlier cases which generally concede to the

legislature the power to determine what property is benefited and the extent to which it might be assessed, and hold that the courts have no control over the discretion of the legislature in this regard, says: "But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle on which such assessment can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must on principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." The cases are cited in the note of the learned author: See, also, *Cooley on Taxation*, 2d ed., 661; *Chamberlain v. Cleveland*, 34 Ohio St. 557.

No one of the states has, by its constitution, more carefully guarded the powers of taxation and assessment than Ohio. Indeed, there is in our constitution a special mandate to the legislature to restrict these powers as conferred on municipalities so as to prevent their abuse: Const., art. 13, sec. 6.

The improvement in this case was made under ²⁶ what is known as the Taylor law, applicable only to cities of the grade of the class to which Columbus belongs. There existed at the time a general provision, section 2270 of the Revised Statutes, which limited assessments made by cities of the grade of Columbus to twenty-five per cent of the value of the property as returned for taxation. By an amendment made shortly after the adoption of the Taylor law, it was enacted that this section, limiting assessments, should not apply to improvements made under that law. The law with the amendment was held valid in *Parsons v. Columbus*, 50 Ohio St. 460. Had the application of section 2270 to the Taylor law not been removed, the question presented in this case could hardly have arisen, or would have been of such a shadowy character as to be beyond judicial cognizance. Whether it was wise in the legislature to have removed the application of this section to the Taylor law is no part of our duty to consider. We will not, however, presume that the legislature intended to adopt an invalid law,

and will give it such a construction as will support it, if that can reasonably be done consistently with its provisions. It is fair to presume that in removing the limitation of this section it was not the intention of the legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the extent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must, therefore, be held that all assessments under this law must be limited to the benefits conferred, or it must follow that the legislature designed a palpable invasion of the rights of private property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the legislature ²⁷ had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received.

The judgment must be reversed and cause remanded for further proceeding. And here it is proper to say that if the facts stated in the pleading of Walsh are found to be true, the city is entitled to have a sum assessed upon each lot substantially equivalent to the special benefits conferred on it by the improvement, unless such sum has already been paid. In ascertaining this sum, the special benefits conferred on each lot as distinguished from those common to the public, are alone to be considered.

Judgment reversed.

SPECIAL ASSESSMENTS — STREET IMPROVEMENTS — BENEFITS CONFERRED.—Property owners, in a city, are chargeable only with an equivalent for the special benefits they derive from municipal improvements, and such equivalent cannot exceed the reasonable value of the improvement. It is not within the power of a state or municipality to impose upon real property any burden or liability for the construction of public improvements adjacent thereto in excess of the benefit thereby added to, or conferred upon, such property: Note to *Hutcheson v. Storrie*, 71 Am. St. Rep. 897. Assessments for the improvement of streets may be made against the property peculiarly benefited, but to the extent only of such peculiar benefits: Note to *Kelly v. Minneapolis*, 47 Am. St. Rep. 612.

STATE v. LIFFRING.

[61 OHIO STATE, 39.]

PHYSICIANS AND SURGEONS—PRESCRIBING OSTEOPATHY IS NOT PRACTICING MEDICINE.—A person does not practice medicine, in contravention of a statute which forbids anyone, without a certificate of qualification, to prescribe for the use of another "any drug, or medicine, or other agency" for the treatment of disease, where he merely prescribes a "system of rubbing and kneading the body," commonly known as osteopathy, for the treatment, cure, and relief of a certain bodily infirmity or disease. Such a system is not an "agency" within the meaning of the statute.

Indictment against Liffing for unlawfully practicing medicine. A demurrer to it was sustained, to which there was an exception, and the case was taken to the supreme court to obtain a decision of that court for the government of future cases.

F. S. Monnett, attorney general, Charles G. Sumner and R. E. Westfall, associate counsel for the state, for the plaintiff.

I. N. Huntsberger, Foraker, Outcalt, Granger & Prior, and Wilby & Wald, for the defendant.

49 SHAUCK, J. Counsel for the state urge upon us the view that when Liffing did "prescribe, direct, and recommend for the use of one Carey B. McClelland, a certain agency, to wit, a system of rubbing and kneading the body, commonly known as 'osteopathy,' for the treatment, cure, and relief of a certain bodily infirmity or disease," as charged in the indictment, he practiced medicine as defined in section 4403f of the act "to regulate the practice of medicine in Ohio," passed February 27, 1896 (92 Ohio Laws, 44), and not having procured from the state board of medical registration and examination, and left with the probate judge of the county, a certificate of qualification to practice medicine or surgery as required by sections 4403c and 4403d of the act, he is guilty of the misdemeanor defined in section 4403g and subject to fine or imprisonment or both. The practice which the act regulates is defined in section 4403f: "Any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall append the letters 'M. D.' or 'M. B.' to his name, or for a fee prescribe, direct, or recommend for the use of any person any drug or medicine or other agency for the treatment, cure, or relief of any wound, fracture, or bodily injury, infirmity, or disease."

⁵⁰ It does not seem to be supposed that the indictment charges the practice of surgery. But the proposition urged by the attorney general is that the "system of rubbing and kneading the body known as 'osteopathy,'" which the indictment does charge, is an agency within the meaning of the statute, and that prescribing and directing the use of such agency is the offense defined by the statute; and it is urged that unless we give so comprehensive a meaning to the word "agency" the associated words "medicine" and "drug" will be denied all meaning and the purpose of the act defeated. Our knowledge of osteopathy is not definite. The word has not found recognition in the dictionaries. It is, however, certain that its use exceeds the suggestions of its etymology. The rubbing and kneading charged in the indictment are consistent with our general knowledge that, in practice, the adherents to osteopathy wholly reject drugs and medicines. The application of the theory that disease may be cured by the manipulation of different parts of the body would not, with close regard to the meanings of words, be called an agency. But assuming a meaning of the word which might justify its being so used, if that would be consistent with the associated words, we meet the suggestion that in obedience to the maxim, *Noscitur a sociis*, the meaning of the word "agency" must be limited by that of the associated words "drug" and "medicine." The cases in which the meanings of words have been thus limited are so numerous that the labor of collecting them appropriately belongs to the compilers of digests. Certainly, this maxim should not be so applied as to defeat the object of legislation. It should always serve the rule that the object of construction is to ascertain intention. In substance, the view presented in support of the exception ⁵¹ is that the legislature intended to prohibit the administration of any agency and the recommendation of any mode of treating diseases or patients, except by the holders of certificates from the board. That purpose would have been unmistakably expressed in fewer words than are employed in this act. With the assumed meaning of the word "agency," it would have been precisely expressed by this act if the words "drug" and "medicine" had been omitted. The maxim invoked is applicable to the case because it serves the universal rule that, in seeking the meaning of an act, all of its words must be considered. It requires the conclusion that the agency intended by the legislature is to be of the general character of a drug or medicine, and to be applied or administered, as are

drugs or medicines, with a view to producing effects by virtue of its own potency.

The same conclusion will follow a more general, and less technical, view of the subject. The objection which its opponents urge against osteopathy is that it recognizes a fragment of truth and assumes that it is the universe of truth; and that, by rejecting remedial agencies generally believed to be effective if rightly prescribed, it withholds from those who resort to it available means of relief and cure. It is not charged that it is otherwise hurtful, nor that its administrations are attended with danger. The obvious purpose of the act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition; and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskillful. The purpose of the act is accurately indicated ⁵² by its title to be "to regulate the practice of medicine."

No provision of the act indicates an intention on the part of the legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge no one is entitled to a certificate from the board of examination. The result of the view urged in support of the exception is that, by this act, the general assembly has attempted to determine a question of science and to control the personal conduct of the citizen without regard to his opinions, and this is a matter in which the public is in nowise concerned. Such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others. From the operation of constitutional provisions designed to establish and perpetuate freedom of thought and action in matters pertaining to religion, it results that in things which are of the first concern we are imperatively denied the guidance of legislative wisdom, and our immortal part is exposed to the enduring pain which is believed to follow the acceptance of religious error.

In the absence of a statute clearly indicating it, the general assembly will not be presumed to have intended the consequences involved in this contention.

Exception overruled.

CLAIRVOYANT PHYSICIANS are not regarded as constituting a school of medicine: *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900.

STATUTES—CONSTRUCTION—THINGS EJUSDEM GENERIS. If a statute, after an enumeration, employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character: *Note to Hawkins v. Great Western R. R. Co.*, 97 Am. Dec. 182. When general words in a statute follow specific words designating certain specified things, the general words are to be limited to cases of the same general nature and description as those which are specified: *People v. Richards*, 108 N. Y. 137, 2 Am. St. Rep. 373; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202.

RAUDABAUGH v. HART.

[61 OHIO STATE, 73.]

CONTRACT TO SELL PROPERTY OF OTHERS—WHEN NOT THAT OF AN AGENT.—A contract whereby a person agrees to sell property owned by himself and others, which purports on its face and by its terms to be the contract only of the individual who sells, is not a contract by the vendor to sell as an agent for the others, although the seller falsely represented to the buyer that he had full power and authority to sell the interests of such other persons.

VENDOR AND PURCHASER—CONTRACT WITH MUTUAL CONDITIONS—PERFORMANCE—NECESSITY OF.—If a person agrees to convey an interest in real estate, such as a leasehold interest in oil property, upon the payment of a given sum as purchase money, the deal to be closed by a certain day, and the purchaser agrees to pay a part of the purchase money on that day, the contract contains mutual conditions, and no action can be maintained thereon by the purchaser without averring a performance, or an offer to perform.

CONTRACT WITH MUTUAL CONDITIONS—PLEADING—PERFORMANCE.—A petition declaring on a contract containing mutual conditions is bad on general demurrer where it contains no allegation of performance, or tender of performance, on the part of the plaintiff. It is not enough to allege a mere willingness and readiness to perform, where there was no attempt to apprise the opposite party thereof.

Action by Hart against Raudabaugh to recover damages for the alleged breach of a contract for the sale of certain interests in oil property. It appeared from the amended petition that Raudabaugh, who was a partner in two different companies, had agreed, by a proposition in writing, which was accepted, to sell to the plaintiff the interests of the other partners, as well as his own, in oil property owned by the two companies; that Raudabaugh represented that he had authority to sell the

property, and was to convey it upon the payment of twenty-three thousand dollars, the deal to be closed by October 1, 1894, that Hart was to pay ten thousand dollars of the purchase money on that date and the remainder in one year; that on October 1, 1894, the market value of the property was twenty-eight thousand dollars. The plaintiff alleged his readiness and willingness to perform from September 21, 1894 until and including October 1, 1894, but that the defendant refused to comply with his contract. The petition also alleged deceit on the part of Raudabaugh, in that he had no power or authority to make the sale; that the contract was, therefore, void; and that, by reason thereof, the plaintiff had been deprived of the advantages that would have otherwise accrued to him. He asked for judgment in the sum of five thousand dollars. A general demurrer to the petition was overruled, and a trial was had in the common pleas, which resulted in a judgment for the plaintiff. This judgment was affirmed by the circuit court, and the defendant prosecuted error to obtain a reversal of the judgments.

Marsh & Loree and Selwyn N. Owen, for the plaintiff in error.

Motter & Mackenzie, Anthony Culleton, and J. H. Goeke, for the defendant in error.

82 SPEAR, J. The question presented to this court is only as to the sufficiency of the amended petition. It appears to have been the opinion of the court below, and is argued here by counsel for defendant in error, that the case made by the amended petition is one upon a contract undertaken to be made on behalf of certain named principals, by one undertaking to represent them and claiming to have authority to do so, whereas, in fact, he had no such authority, and is, therefore, liable upon that agreement for a breach of it rather than upon the contract itself; also that there is presented in the facts a case of deceit based upon the alleged false representation as to authority and Hart's belief in the same, and his contracting and agreeing to pay the purchase money in reliance upon such representation as true; and that, in some way, not very clearly **83** stated, this construction of the pleading gives the plaintiff a favorable standing which he might not otherwise have.

Whether the conclusion which counsel seem to draw from their construction of the pleading is warranted or not we think

need not be discussed, for we are impressed that, applying the rule that the intent of the parties is to be gathered primarily from the form of the agreement and the mode of the signature, the contract set out in the pleading, and the additional facts pleaded, do not justify the conclusion that the contract was made, or was intended to be made, or understood to be one on the part of Raudabaugh as agent. It is true the statement is that Raudabaugh represented that he had authority from the other members of the partnership named to sell, and undertook to sell, the interests of the other partners in the property as well as his own. But it is nowhere averred that he undertook to sell for them or act for them in any manner. On the contrary, the averment is that the proposition was tendered to plaintiff by defendant; that in the proposition so tendered he "agreed to sell to plaintiff," etc. Again, "said defendant further agreed to drill and complete one additional well," etc. Again "said agreement between the plaintiff and the defendant contained a condition that defendant would sell said plants and property above set forth to plaintiff, provided the deal was closed by October 1, 1894. Plaintiff further says that on the twenty-sixth day of September, 1894, he located the well as required by said contract and notified defendant in writing of such location," etc. In the absence of pertinent allegations to that effect it would seem like a strained construction to claim that the contract was one of agency. To test the question, suppose this action ⁸⁴ had been brought against the other partners to recover against them for Raudabaugh's dereliction (an averment that Raudabaugh had authority to sell their interests being substituted for the statement that he had not such authority), but without any allegation that he was acting in making the sale for them or in their behalf, how would the petition have stood against a general demurrer? Manifestly, the absence of any allegation that the contract had been undertaken to be made between Hart and such other persons would have been fatal to the pleading. One case relied upon to sustain this proposition of counsel is that of *White v. Madison*, 26 N. Y. 117. We think it wholly fails to support the contention. In that case Madison, who was a deputy sheriff, undertook to bind his principal, one Snow, the sheriff, by a promissory note signed, "N. D. Snow, Sh'ff, Chau. Co. by A. Z. Madison, Dep. Sh'ff," given to a mutual insurance company for a policy issued upon certain goods which the sheriff had seized in attachment. The note not being paid,

suit was brought against the sheriff, which failed on the ground that Madison had no authority to bind his principal. Action was then commenced against Madison, who was held on the principle that one making a contract in behalf of another without authority is liable on the ground that he warrants his authority, and not that the contract is to be deemed his own, and the damages to which the professed agent subjects himself are measured, not by the contract, but by the injury resulting from his want of power, and involve, e. g., the costs of an unsuccessful action against the alleged principal to enforce the contract. A controlling feature of the above case, and one which conclusively differentiates it from the one at bar, is that the contract, on its face and ⁸⁵ by its terms, plainly purports to be a contract with the principal. The same is true of the other cases cited to the same point, viz., *Walker v. Bank*, 9 N. Y. 582, *Weare v. Gove*, 44 N. H. 196, *Godwin v. Francis*, L. R. 5 Com. P. 295, *Pauli v. Simes*, 6 Car. & P. 506, 25 Eng. Com. L. 573, and *Simons v. Patchett*, 7 El. & B. 568, cited by Professor Sutherland in volume 3 of his work on Damages, page 1856. Nor is this conclusion in any way at variance with the holding of this court in *Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846, with which holding we are in entire accord. There, too, the party contracted as agent.

It follows, and it seems to us naturally, that the contract is to be treated as one wholly between Raudabaugh and Hart, and that the allegation with respect to the former's representation of authority to sell the interests of his partners in the leasehold property, can have no higher or other significance than as a representation that the seller had not the full title to the property, but could obtain it and would do so and convey the whole ownership to the purchaser on payment of the purchase money. Not having authority to sell the interests of his partners may furnish a reason for noncompliance by Raudabaugh. The gist and gravamen of the damage to Hart, however, was not in the reason for not complying with his contract to convey a full title, but in the fact of not so conveying. So long as the fact could be truthfully alleged, a reason for the existence of the fact was immaterial. That was the vital stipulation which, according to the pleading, Raudabaugh neglected to perform. Had he complied with that promise, his want of authority to sell the interests other than his own, as such, at the time of the contract or afterward, would have been unimportant. He was at liberty to acquire the other ⁸⁶ interests and complete his contract by a

conveyance from himself only. In this respect the contract may be likened to the class known as optional contracts, a species of agreement very well understood in the trading world, where a party ventures to sell property which he is not then possessed of but expects to acquire.

With respect to the facts pleaded showing ground for an action of deceit, it may be sufficient to remark that the claim is of no possible consequence. If maintainable, it would relieve the plaintiff of no burden as to performance on his part, nor entitle him to any higher measure of damage against the defendant. In any event, if entitled to recover at all, the measure of damages would be just what he prayed for, viz., the difference between the contract price and the market value.

The contract pleaded was one that contained reciprocal and mutual obligations, and the limit of performance, was, by the terms of the agreement, fixed for October 1, 1894. Time was thus made of the essence of the contract, as clearly stated in these words: "Said agreement between plaintiff and defendant contained a condition that defendant would sell said plants and property above set forth to plaintiff, provided the deal was closed by October 1, 1894." Each party was thus duly apprised of the time within which the deal was to be concluded. What then was it necessary for either to do in order to put the other in default? With respect to such contracts, Hitchcock, J., in *Courcier v. Graham*, 1 Ohio, 342, observes: "If one party was ready and offered to perform his part and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the ⁸⁷ default of the other, though it is not certain that either is obliged to do the first act." And it would follow that neither party could, in such case, maintain any action upon the contract against the other without offering and proving performance, or a readiness and willingness to perform, and notice to the other party of such readiness and willingness: 1 *Warvelle on Vendors*, 366. Under the ancient rule a purchaser could not maintain an action for breach of contract without having tendered a conveyance and the purchase money: 1 *Sugden on Vendors*, 366. The later rule, and the one which has always prevailed in this state, is that, in the absence of stipulations in the contract to the contrary, the conveyance is to be prepared and furnished by the vendor, but the ancient rule otherwise, it is believed, has always prevailed here, and is the law to-day. So long, therefore, as there is no tender of the deed on the one

hand, nor performance on the other, neither party is in default: *Irvin v. Bleakley*, 67 Pa. St. 28; *Leaird v. Smith*, 44 N. Y. 618. To entitle the vendee to demand a deed he must be ready and offer to comply with the contract on his part and show ability to perform it: *Smoot v. Rea*, 19 Md. 398. Whether or not it is necessary to have present and offer, in legal tender money, the exact sum due as is required in making tender upon an obligation for the unconditional payment of money, except where waived, it is at least necessary that the purchaser show readiness and ability to comply. Nor does the transaction imply haste, but deliberation, rather. As expressed by Woodworth, J., in *Fuller v. Hubbard*, 6 Cow. 13, 16 Am. Dec. 423: "There is, then, something more to be done than the simple payment or the tender of the purchase money. A conveyance must be demanded. Nor would this alone appear to satisfy the principle⁸⁸ of the rule. A reasonable time should be allowed to the vendor to prepare the conveyance. The purchaser not having himself prepared it (which he may do), he shall not be allowed to retire immediately and bring his action, but should present himself to receive the conveyance, which he has thus required to be furnished. Deliberation and advice of counsel may be necessary in settling its terms. The framing and execution of modern conveyances, even with us, where the titles to real estate are much less complicated than in England, are not like the payment of money, or the delivery of a chattel." The rule here announced is followed in a number of other cases in New York and elsewhere: *Wells v. Smith*, 2 Edw. Ch. 78; *Bruce v. Tilson*, 25 N. Y. 196; *Fuller v. Williams*, 7 Cow. 54, 17 Am. Dec. 498; *Connelly v. Pierce*, 7 Wend. 129; *Slocum v. Despard*, 8 Wend. 619; *Hartley v. James*, 50 N. Y. 43; *People v. Mills*, 17 Cal. 276. The case of *Smith v. Lewis*, reported in 24 Conn. 624, 63 Am. Dec. 180, and again in 26 Conn. 110, is authority for the proposition that: "The word 'tender,' as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do so, and notice to the other party of such readiness." In *Cutter v. Powell*, 6 Term Rep. 320, 2 Smith Lead. Cas. 12, the rule is given thus: "Where two acts are to be done at the same time, as when A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day,

neither can maintain an action without averring a performance, or an offer to perform his own part, though it is not certain which of them is obliged to do the ⁸⁹ first act; and this particularly applies to cases of sales."

But there seems no doubt as to the rule in this state. In *McCoy v. Bixbee*, 6 Ohio, 310, 27 Am. Dec. 258, it is held that: "Covenants to convey a tract of land, specifying no time of conveyance, and a covenant to pay therefor so much money in hand and so much at a future day, are mutual covenants. In such a case a purchaser cannot have a cause of action, without averring the payment or tender of the purchase money." And in *Campbell v. Gittings*, 19 Ohio, 347, it is held: "Where an article contains a covenant by one party to execute and deliver a warranty deed, and by the other to execute and deliver, when the deed is tendered, a bond and mortgage for the purchase money, though the party first named neglect or refuse to deliver the deed, the other is not entitled to sue, after having neglected, at the proper time, to offer or tender a bond and mortgage; and a declaration on the covenant to make a deed containing an averment that the plaintiff offered to execute a bond and mortgage without averring a tender, or what is equivalent thereto, is bad on demurrer." And in the opinion by Avery, J., it is said: "The covenants of these parties respecting the deed, and the mortgage to secure the purchase money, being both to be presented on the same day, are dependent covenants in which, according to a clear legal principle, performance cannot be exacted from either party, as a condition precedent. Both, it is understood, must perform at the same time, neither being under any obligation to trust the other. . . . The case made, according to the declaration before us, is this: The parties meet on the day when the acts required of each in the article are to be done; the defendant refuses to perform ⁹⁰ on his part, and therefore the plaintiffs neither perform nor tender performance. The consequence to the defendant of his neglect and refusal is, that he can maintain no action at law for the purchase money because he has neither delivered nor tendered a deed. Apply the same rules to both these dependent covenants, and the plaintiffs, who do not show themselves ready to perform by offering or tendering the bond and mortgage, cannot maintain this action for the deed. Great strictness is required of a party to a suit, who would avail himself of a tender or of an offer to perform." *Mowry v. Kirk*, 19 Ohio St. 375, was an action to recover for nondelivery of certain railroad bonds pur-

chased, in which a recovery was had in the trial court for the difference between the purchase price and the market value of the bonds. This judgment was reversed for error in the charge and for that, upon the whole case, the judgment should have been for defendant. We quote from the opinion at page 383: "But the court below further told the jury that when 'the defendant denied the agreement, and refused to perform on his part, this dispensed with the necessity of a tender.' In this we think there was error. I can find no authority to sustain the proposition given to the jury. In the interview between Kirk and Mowry, the next morning after the bargain was made, Kirk simply demanded the bonds. He did not offer to pay for them nor tender payment for them; nor does it even appear that he then had the money to pay for them. His right to demand and have possession of the bonds depended on his making or tendering payment, unless such payment or tender was waived by Mowry. Though the property in the bonds passed by the bargain, the right of possession did not pass ⁹¹ without payment or its equivalent; and it seems to us that neither principle nor authority would authorize us to hold that the mere fact of a denial of the contract by the vendor alone amounted to a waiver of a tender of the price of the bonds. The vendor might well say to himself, 'I deny the contract to be as it is claimed to be; but if it be insisted on as claimed, I still have the right to insist on payment before delivery.' And if, in a transaction of this kind, where prompt action was evidently contemplated by both parties, a week's delay occurs in making either tender or payment, a rescission of the contract by the mutual consent of both parties may well be presumed in favor of either. Mutual delinquency gives rise to the presumption of mutual assent to a rescission: See Parsons on Contracts, 667 et seq.; *Lewis v. White*, 16 Ohio St. 454." And in the syllabus it is held: "The mere facts that the vendor denied having made the contract and refused to deliver the bonds did not imply a waiver by him of the vendee's obligation promptly to tender payment. The delinquency of the vendee in failing to tender payment for a week after the contract was made gave rise to the conclusive presumption, as against him, of his assent to a rescission of the contract, and authorized the vendor to act on that presumption."

In the light of the rules thus ascertained, what is the attitude of the plaintiff below as shown by the petition? It is stated in the brief of defendant in error that the amended peti-

tion alleges "that plaintiff did all things on his part to be done and performed under said contract." Whether, if this were so, it would or not avail the plaintiff we need not consider, because the allegations of the pleading do not justify this claim. On the contrary, ⁹² the language is: "Plaintiff further says that from the twenty-first day of September, 1894, and until and including October 1, 1894, he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract, but the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff." Of what consequence can this averment be so long as there was no attempt to apprise the adverse party of such readiness and willingness, no tender of performance on his part, in any way or manner? The fact of readiness to perform locked up in the breast of plaintiff could neither give information to defendant, nor entail on him any duty. It is, in law, as though the pleading were without any averment as to willingness and readiness to perform on the plaintiff's part. Nor is this fault aided by the allegation of demand of performance. The allegation of demand is at best vague and uncertain. It does not even purport to have been made on or before October 1st. It would not, we think, have availed had it so stated, for applying the doctrine of *Mowry v. Kirk*, 19 Ohio St. 375, the defendant had the right to refuse to perform on his part so long as there was no effort at performance on the other side. To hold that a party so circumstanced may put the other party in the wrong by merely demanding of him that he make conveyance of the leasehold interests would be to countenance a scheme smacking of mere bluff; it would be to give him an advantage over his adversary without any show of readiness or ability to perform on his part. We are aware that there is a holding in a sister state that the demand implies that the demandant is himself ready and able to perform. For the reasons above stated, ⁹³ and many others, we cannot assent to the proposition. Nor can it be said, reasonably, that the pleading shows that defendant had put it out of his power to convey. For aught that is alleged he could have acquired the title and could have completed the contract on his part had the plaintiff come forward with the money or given notice that he was able and ready to perform. In the absence of such action on or prior to October 1st, the defendant might well conclude, as

in *Mowry v. Kirk*, 19 Ohio St. 375, that the contract had, by implied assent, been rescinded.

We are of opinion that the overruling of the demurrer to the amended petition was erroneous and that both judgments should be reversed. The cause will be remanded to the court of common pleas with directions to sustain the demurrer to the amended petition, and for further proceedings according to law.

Reversed.

AGENCY—FALSE ASSERTION OF.—If a contract is entered into by one who assumes to act as the agent of another without having been authorized to make the contract, such pretended agent is personally answerable in the precise terms of the contract: *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706.

VENDOR AND PURCHASER—OWNERSHIP—MUTUAL AND DEPENDENT ACTS—TENDER AND DEMAND.—It is not necessary that a vendor of land be the absolute owner thereof at the time when he contracts to sell it. A purchaser of land is not entitled to a conveyance until full payment of the purchase money; and, as the acts of payment and conveyance are mutual and dependent, neither party is in default until after tender and demand by the other: *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123. A vendor of lands is under no obligation to execute a deed until the purchase price is tendered or paid, and cannot be put in default without a tender of such price: *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23.

CONTRACTS WITH MUTUAL AND DEPENDENT COVENANTS—OFFER TO PERFORM—PLEADING.—In cases of mutual contracts, the party complaining of the other's failure to execute must show an offer to perform on his part: *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467. The party bound to make payment must seek the person to whom the obligation is due and offer performance: *Schuessler v. Watson*, 37 Ala. 98, 76 Am. Dec. 348. A party seeking to recover on the breach of a contract containing mutual and dependent covenants must aver and prove his own offer and readiness to perform, and that the other party has failed to perform on his part: *Sargent v. Adams*, 3 Gray, 72, 63 Am. Dec. 718.

CONTRACTS.—WHERE TIME IS OF THE ESSENCE of the contract, and one of the parties is not ready and able to perform his part of the agreement on the day fixed, the adverse party may elect to consider it at an end: *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257.

STAFFORD v. PRODUCE EXCHANGE BANKING COMPANY.

[61 OHIO STATE, 160.]

CORPORATIONS—LIEN ON STOCK, RESERVATION OF.

If a corporation issues a certificate of stock, containing a stipulation that it shall not be "transferable by any stockholder liable to this company, as principal debtor or otherwise, without consent of the board of directors," it thereby expressly reserves a lien on the stock to secure the debts of the holder to it.

CORPORATIONS—LIEN ON STOCK—CREATION OF, BY CONTRACT, AND RIGHT TO ASSERT.—One who accepts a certificate of stock issued to him by a corporation organized to do the business of a savings and loan company, and which contains the reservation of a lien upon the stock to secure the payment of his debts, accepts the condition. The lien, therefore, exists by force of a contract, and may be asserted against a transferee who receives the stock before, but does not present it for transfer on the company's books until after, the original holder becomes indebted to the corporation.

The banking company was a corporation organized to do the business of a savings and loan company. It issued twenty shares of its capital stock to one Lauer. This stock was "transferable only on the books of the company in person, or by attorney, on the surrender of the certificate," and, by an express stipulation in the certificate, the stock was "not transferable by any stockholder liable to this company, as principal debtor or otherwise without consent of the board of directors." Shortly after obtaining the certificate, Lauer pledged it to another company to secure an indebtedness, and within a few weeks he became indebted to the defendant company, which did not know, at the time, that the stock certificate had been pledged, or that the plaintiff in error, Stafford, had or claimed any interest in it. Before Lauer became indebted to the defendant banking company, the pledge of stock was sold, and Stafford purchased the certificate; and, after Lauer became indebted to the defendant banking company, Stafford demanded of the latter company a transfer of the shares standing in the name of Lauer. This demand was refused by the company because of Lauer's indebtedness to it at the time. Stafford then sought a decree to compel the transfer to him. His petition was dismissed, and he brought a proceeding in error to reverse the judgment.

Squire, Sanders & Dempsey, for the plaintiff in error.

Wilcox, Collister, Hogan & Parmely, for the defendant in error.

¹⁶⁷ SHAUCK, J. Counsel for the plaintiff cite numerous cases which are said to demonstrate that he is entitled to recover a judgment upon the facts found. Many of them are cases in which the conclusions were reached from a consideration of statutory provisions forbidding the issuing corporation to reserve a lien upon its stock to secure the debts of the holders. It seems to be sufficient to say that this is true of all the cases which relate to the attempted assertion of a lien upon their stock by national banks organized under the currency acts of 1863 and 1864, even though notice of the lien was expressed on the face of the certificate. The former act permitted such lien; the latter forbade it, but without saving the right as to banks previously organized. This is distinctly pointed out as the ground of the decision in *Conklin v. Second Nat. Bank of Oswego*, 45 N. Y. 655. Of course, the lien cannot be reserved by the corporation if it is forbidden by the statute from which it derives its existence. In numerous others of the cases ¹⁶⁸ cited, the courts have held that a corporation issuing certificates of stock which do not show upon their face that a lien has been reserved to secure the debts of the holder will not be permitted to assert such lien, even though it be provided for in a by-law if the transferee of the stock has no knowledge of the by-law. Such a case is *Des Moines Nat. Bank v. Warren Co. Bank*, 97 Iowa, 204, where the court approves its previous holding in *Farmers' etc. Bank v. Haney*, 87 Iowa, 101, that a by-law of the corporation providing for a lien in its favor on the stock to secure the holder's debt and the reservation of the same lien by stipulation recited in the certificate of stock constitute a contract between the corporation and the holder, and that this lien is superior to that of an attaching creditor of the holder. The cases cited by counsel for plaintiff contain much authority for the proposition that the transferee of stock will not be required to submit to the assertion of a latent equity with respect to it, and that the equity to which he must submit is a lien either created by the statute under which the corporation is formed, of whose provisions all are required to take notice, or by a contract between the corporation and the holder whose terms are brought to the notice of the transferee. But in the present case the lien asserted was reserved by the issuing corporation by the express terms of the certificate issued to the holder. His acceptance of the certificate containing the reservation of a lien upon the stock to se-

cure the payment of his debts was an acceptance of that condition, and the lien existed by force of a contract. That a valid lien may be so created and that it may be asserted against the transferee of the certificate containing notice of the lien reserved is held in *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Jennings v. Bank of California*, 79 Cal. ¹⁶⁹ 323, 12 Am. St. Rep. 145, and in *Farmers' etc. Bank v. Haney*, 87 Iowa, 101. That the principles of the law of contracts are applicable to transactions of this character has not, within our observation, been denied by any court since the decision of *Morgan v. Bank of North America*, 8 Serg. & R. 73, 11 Am. Dec. 575. With respect to *Pitot v. Johnson*, 33 La. Ann. 1286, cited for the plaintiff, it may be said that there is no such statement of the facts as will disclose the precise point decided, that the conclusion depended upon provisions of the Civil Code, and that the court felt constrained to follow former decisions whose correctness it more than doubted.

Counsel for the plaintiff inquire for the statutory authority to the issuing corporation to reserve a lien of this character. But since the right to enter into contracts is general, and denied only when prohibited by statute or some consideration of public policy recognized by the courts, it would be more helpful, perhaps, to inquire for the statutory provision or the consideration of public policy by which this contract is forbidden. It is quite true that with respect to the franchises which corporations exercise, and in their dealings with the public, the statute is to be regarded as the source of their authority. But it would be difficult to maintain the proposition that in their transactions with their stockholders or in the transactions of stockholders among themselves general rules do not apply, if consistent with the statute. But the defendant was formed, as its articles of incorporation show, to do the business of a building and loan company. An answer to the question of counsel may be found in section 3799 of the Revised Statutes: "The board of directors may prescribe . . . the mode of transacting, managing, and conducting the affairs and business ¹⁷⁰ of the corporation." The power exercised by the defendant to make this contract was clearly within this provision, and the statute nowhere defines a particular mode for the exercise of the power conferred. Counsel for the plaintiff say that because the defendant made its loan to Lauer, after he had pledged the stock, it was its duty to protect itself by asking for

the stock. This is but another mode of denying the efficacy of the stipulation in the certificate, for if that stipulation were absent the defendant might have protected itself in the mode suggested. If we should impute to certificates of stock all the attributes of negotiable instruments it would not avail the plaintiff, for the holder is always bound by the terms of the instrument which he receives. By the transfer made the plaintiff became the equitable owner of the stock. It was clearly within his power to acquire the legal title by presenting the certificate for transfer on the stock books of the defendant at a time when Lauer was not indebted to it. This right he did not choose to exercise. He voluntarily remained in the position of the holder of an equitable title and amenable to the rule that he must submit to the assertion of an adverse equity which is either superior in character, or equal in character and prior in time. He cannot be permitted to exact from the defendant a degree of care for his interests which he did not himself choose to exercise.

Whether we consider the principles involved in the case or the adjudications with respect to them, it seems clear that the judgment of the circuit court is appropriate to the facts which it found.

Judgment affirmed.

CORPORATIONS—LIEN ON STOCK.—If a certificate of stock declares that, "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name the stock stands on the books of the bank, except by the written assent of the president or cashier," a stockholder who accepts a certificate with this condition printed on it, and then borrows money of the bank, must be held to have assented to the condition, and to be bound by it. A condition printed in and upon a certificate of stock is also sufficient to put a purchaser thereof on inquiry, and make it his duty to ascertain whether the stock is free of such condition: See monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 379, 395, on the extent to which transfers of stock may be restricted. Compare the note to *Morgan v. Bank*, 11 Am. Dec. 581, as to the lien of corporations on stock, and see *Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

COVINGTON & CINCINNATI BRIDGE COMPANY v. STEINBROCK.

[61 OHIO STATE, 215.]

NEGLIGENCE—DANGEROUS WORK—DUTY AND LIABILITY.—A person who has a piece of work, the performance of which is dangerous to others, is under an obligation to see that it is carefully performed, which he cannot delegate to another so as to avoid liability in case of injury.

INDEPENDENT CONTRACTORS—LIABILITY FOR ACTS OF.—One under a duty to the public, or to a third person, to see that work he is about to do, or to have done, is carefully performed so as to avoid injury to others, cannot absolve himself from liability by the employment of an independent contractor.

INDEPENDENT CONTRACTORS—LIABILITY FOR ACTS OF—TAKING DOWN A WALL.—If a warehouse is, in a measure, destroyed by fire, so that one of the walls is left standing in such a ruined condition as to be a menace to the public and to the property of persons in the vicinity, and its owner is required to take the wall down, he is answerable where he employs an independent contractor to raze the wall, and where the wall, owing to the negligence of the contractor in taking it down, falls outward upon, and injures, the property of third persons near by, notwithstanding a stipulation in the contract that the contractor shall save the employer harmless for injury to others in doing the work.

Maxwell & Ramsey and Robert Ramsey, for the plaintiff in error.

W. W. Symmes, for the defendants in error.

220 MINSHALL, J. This case was argued and submitted with the case of Bridge Co. v. Proctor D. Patrick, the injury in each case, and for which the action was brought, having been caused by the falling of a wall, attributed to the negligence of the defendant; Patrick, therefrom, having received an injury to his person, and he and his partner, Steinbrock, an injury to their property. In the case of Patrick and his partner, the case was taken from the jury at the close of the plaintiff's evidence, on the ground that there was no evidence to support the case. The judgment was reversed, on error, by the general term and cause remanded (4 N. P. 229); and error is prosecuted here to reverse the general term. In the case of Patrick alone for an injury to his person, a verdict was rendered for the plaintiff, under the charge of the court, to which exceptions were reserved; and the judgment was **221** affirmed by the general term: 5 N. P. 374. A bill of exceptions, taken and made a part of the record, in each case, contains all the evidence, and,

also, in the last case, the charge of the court and certain instructions that were refused. Both cases, however, turn upon the question whether the defendant below was relieved from liability on the ground of having employed an independent contractor to do the work, the negligent doing of which caused the injury complained of in each case.

In August, 1895, a large brick warehouse, some five stories high, was in a measure destroyed by fire, the walls of which, at least the east one, were left standing in such a ruined condition as to be dangerous to the public, and were required by the inspector of buildings to be taken down. The east wall extended south along an alley from its intersection with Second street some ninety or a hundred feet; and opposite to this wall, on the east side of the alley, was the property of the plaintiffs. After the notice by the inspector of buildings, the bridge company made a contract with one Hasler to take down the walls of the building for a consideration agreed on by the parties, the company retaining no express control of the work; but stipulating that Hasler, the contractor, should save it harmless in case of accident to person or property during the work. While engaged in taking down the east wall, a part of it fell and caused the injury sued for in each case. It was, from the time of the fire, a mere ruin, "bulged out," as the witness termed it, toward the east, and manifestly dangerous to the public, of which the plaintiffs below were part. It could, however, as shown by the testimony, by the exercise of great care, have been taken down without probable injury to others; ²²² and the falling of the wall, or a part of it, was caused by the negligence and want of skill on the part of the contractor in the mode adopted for taking it down. This is not controverted by the plaintiff in error. An attempt was made, after having weakened the wall on a line below the "bulge," to pull it in upon the premises by a rope attached to it; but, by reason of the "bulge" that part fell outward over the alley and on the property of the plaintiffs, their property being lower than the wall. This, as the evidence shows, might have been readily anticipated by a person of skill and experience in such business. Patrick was at the time in the part of his property on which the wall fell, and was injured, as was also the property of himself and partner. No fault is imputed to him, nor his partner.

The doctrine of independent contractor, whereby one who lets work to be done by another, reserving no control over the performance of the work, is not liable to third persons for in-

juries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these, applicable as we think to this case, is where the employer is, from the nature and character of the work, under a duty to others to see that it is carefully performed. It cannot be better stated than in the language used by Cockburn, C. J., in *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 326, a leading and well-considered case. It is, "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see to the doing of that which is necessary to prevent ²²³ mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—or to do what is necessary to prevent the act he has ordered done from becoming unlawful." It was suggested by Lord Blackburn in *Hughes v. Percival*, L. R. 8 App. Cas. 443, that this was probably too broadly stated. But in the recent case of *Hardaker v. Idle Dist. Council* (1896), L. R. 1 Q. B. Div. 335, the doubt expressed by Lord Blackburn was regarded as unwarranted, and the principle as formulated by Cockburn was adopted and applied. This does not abrogate the law as to independent contractor. It still leaves abundant room for its proper application. "There is," as stated by Cockburn, "an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted."

The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another: *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Hughes v. Percival*, L. R. 8 App. Cas. 443; *Dalton v. Angus*, L. R. 6 App. Cas. 829; *Hole v. Railway Co.*, 6 Hurl. & N. 488; *Gray v. Pullen*, 5 Best. & S. 970; *Hardaker v. Idle Dist. Council* (1896), L. R. 1 Q. B. Div. 335; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Spence v. Schultz*, 103 ²²⁴ Cal. 208; *Sturges v. Theological etc. Soc.*, 130 Mass. 414, 39 Am. Rep. 463; *Gorham v. Gross*, 125 Mass. 232,

28 Am. Rep. 224; Mechem on Agency, secs. 747, 748; Wharton on Negligence, sec. 185; Wood on Master and Servant, sec. 316; Shearman and Redfield on Negligence, sec. 176; Pickard v. Smith, 10 Com. B., N. S., 470; Penny v. Wimbledon Urban Council (1898), L. R. 2 Q. B. 212, 217; Halliday v. National Teleph. Co. (1899), L. R. 2 Q. B. 392; Lawrence v. Shipman, 39 Conn. 586, 589; Stevenson v. Wallace, 27 Gratt. 77; Water Co. v. Ware, 16 Wall. 566; Black v. Christ Church Finance Co., [1894] App. Cas. 48.

The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute: Cockburn, C. J., in Bower v. Peate, L. R. 1 Q. B. Div. 321. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work. In Bower v. Peate, L. R. 1 Q. B. Div. 321, the defendant, whose house adjoined that of plaintiff, let to a contractor the taking down and rebuilding of his house, reserving no control of the work. The work let required the lowering of the foundations of the defendant's house, and it was known that this would require the practice of underpinning, or some other safe mode of shoring or supporting the plaintiff's soil, during the operations. Owing to neglect in this regard, injuries accrued to the plaintiff's house, which gave rise to the action; and on the principle ²²⁵ above stated the defendant was held liable. In Hughes v. Percival, L. R. 8 App. Cas. 443, on appeal, the appellant and respondent were owners of adjoining houses between which was a party-wall, the property of both. The appellant's house also adjoined B's house and between them was a party-wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party-wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen, in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party-wall between the appellant's house and B's house, in consequence of which the appellant's house fell, and the fall dragged over the party-wall between it and the respondent's house and injured it. The cutting into the party-wall

was not authorized by the contract between the appellant and the builder; and it was held that the law cast a duty upon the appellant to see that reasonable care and skill were exercised in those operations which involved a use of the party-wall belonging to himself and the respondent, exposing it to the risk above mentioned, and that he could not get rid of the responsibility by delegating the performance to a third person. *Dalton v. Angus*, L. R. 6 App. Cas. 829, is a similar case to this and was ruled the same way. In *Hardaker v. Idle Dist. Council*, L. R. 1 Q. B. Div. 335, the defendant, under statutory authority, employed a contractor to construct a sewer for it. In consequence of his negligence in carrying out the work a gas main was broken, and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided, and an explosion took place, by which the wife was ²²⁶ injured in her person and the husband in his property; the defendant was held liable on the ground that it owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main, and that this duty could not be delegated to another so as to relieve it from liability for negligence. In *Halliday v. National Teleph. Co.*, L. R. 2 Q. B. 392, the defendant employed a contractor to put in conduit tubes for it under a highway, and the joints of the tubing were to be soldered together with melted lead. By the negligence of the servants of the contractor in doing the work, melted lead, by an explosion, was splashed over the plaintiff on the public sidewalk, and the company was held liable. It is there said that, from the authorities, "it is very difficult for a person who is engaged in the execution of dangerous work near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such work to be executed to see that they are carefully carried out, so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Higmore was engaged to perform." In referring to the English cases, *Smith, L. J.*, in *Hardaker v. Idle Dist. Council*, L. R. 1 Q. B. Div. 335, said: "The ratio decidendi of these cases is, that as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed on the defendant to take the necessary precautions to ensure that the duty should

be performed." *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, *Stevenson v. Wallace*, 27 Gratt. 77, and *Water Co. v. Ware*, 16 Wall. 566, cited above, ²²⁷ also clearly illustrate this distinction. In *Packard v. Smith*, 10 Com. B., N. S., 470, the defendant was the lessee of refreshment rooms and a coal cellar, and there was an opening for putting coal into the coal cellar on the arrival platform at a railway station. The defendant employed a coal merchant to put coal into the cellar, and the coal merchant's servant, while putting coal into the cellar, left the hole insufficiently guarded. The plaintiff, while passing in the usual way out of the station, fell into the cellar and was injured. The defendant was held liable. In commenting on this case, in *Penny v. Wimbledon Urban Council*, L. R. 2 Q. B. 212, Bruce, J., said: "The principle of the decision, I think, is this, that where a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." This principle seems to apply directly to the case at bar. The walls as they stood were a nuisance to the public; and taking them down would necessarily be attended with danger to others, unless care was observed in doing the work. This, though a misfortune, was an incident to the defendant's ownership of the property, cast on him by the law, and which he could not shift to another without being liable for negligence in razing the walls.

Conformable to these principles the law seems settled in this state. In *Circleville v. Neuding*, 41 Ohio St. 465, the city let to a contractor the construction of a cistern in one of its ²²⁸ streets, reserving no control over the work. The plaintiff, during the prosecution of the work, fell into it in the night and was injured by reason of the neglect of the contractor to cause it to be properly protected. The city was held liable because of its statutory duty in the premises. But, as already seen, the fact that the duty had been imposed by statute is not material. Its liability arises from the fact that it was its legal duty to cause the work to be protected, and could not delegate this duty to another so as to absolve it from liability. So, in *Railroad Co. v. Morey*, 47 Ohio St. 207, the defendant employed a contractor to do for it certain plumbing which involved the open-

ing of the public highway for the purpose of laying a drain therein. The plaintiff in the night-time fell into the ditch by reason of the negligence of the contractor in not properly protecting it. The defendant was held liable on the ground stated in the syllabus, which is as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employés of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral, and flowing from the negligent act of the employé alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." It is claimed that this proposition of the syllabus in *Railroad Co. v. Morey*, 47 Ohio St. 207, should be modified. ²²⁹ We see no reason for doing so. It is supported by reason and authority and many well-considered cases. In so far as *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, may be construed as supporting a different doctrine, it is not law. It has been properly distinguished in *Railroad Co. v. Morey*, 47 Ohio St. 207. It should be confined to the cases where, from the nature of the work or the circumstances under which it is to be performed, no particular duty is imposed on the party procuring the work to be done to see that it is carefully done.

It is urged as unreasonable that one who has work to perform that he himself cannot perform, from want of knowledge or skill, should be held liable for the negligence of one whom he employed to do it, since if he did reserve control, it would avail nothing from his own want of knowledge and skill. There is a seeming force in this, but only so. It is not agreeable to the principles of distributive justice. For it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted and over which he had no control. Hence, where work is to be done that may endanger others, there is no real hardship in holding the party for whom it is done responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will, nevertheless, be the more careful in selecting an agent to

act for him. This is a duty which arises in all cases where an agent is employed; and no harm can come from stimulating its exercise in the employment of an independent contractor, where the rights of others are concerned.

Applying the principles discussed to the case under ²³⁰ review, and there seems little room for doubt as to how it should be decided. The duty, as observed, was imposed by law upon the bridge company to take down the walls left standing by the fire, because they were a menace to the public and the property of persons in the vicinity. The doing of the work necessarily involved danger to others unless great care was used; and the injury resulted from negligence in doing the work. It was not collateral to the employment, as would have been the case had a servant of the contractor, while at work, negligently let fall a brick upon a person in passing by: *Pickard v. Smith*, 10 Com. B., N. S. 470; on the contrary, it resulted from the negligent manner in which the work let to be done was done, and should have been anticipated by the employer as a probable consequence, unless care was observed. It is the duty to observe such care, enjoined on a party by law, that cannot be delegated to another so as to avoid liability for its neglect.

There was no error then in the general term reversing the judgment of the special term for taking the case from the jury. In the case of *Patrick* alone, where a verdict was rendered for the plaintiff under the charge of the court, we see no reason for reversing it. The charge properly stated the law, and the instructions asked by the defendant being inconsistent with the charge, were properly refused. The judgment in each case is therefore affirmed.

Liability for Negligence and Other Torts of Independent Contractors.*

An Independent Contractor is One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work: *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925; *Norfolk etc. Ry. Co. v. Stevens*, 97 Va. 631, 636. For illustrations of this rule, see *Smith v. Mil-*

***REFERENCE TO MONOGRAPHIC NOTES.**

- Acts of servant for which master is not answerable: 54 Am. St. Rep. 91, 92.
- Liability of an employer for the acts of a contractor: 51 Am. Dec. 200-206.
- Liability of an employer for the acts or negligence of a contractor: 55 Am. Dec. 318-321.
- Liability of cities for the negligence and other misconduct of their officers and agents: 30 Am. St. Rep. 411-413.
- Negligence of contractor: 27 Am. Rep. 702-704.
- Relation of master and servant exists, when: 22 Am. St. Rep. 459-463.
- The right to lateral support: 33 Am. St. Rep. 473.

waukee etc. Exchange, 91 Wis. 360, 51 Am. St. Rep. 912; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703; Hughbanks v. Boston Inv. Co., 92 Iowa, 267; Casement v. Brown, 148 U. S. 615; Emmerson v. Fay, 94 Va. 60; Indiana Iron Co. v. Cray, 19 Ind. App. 565; Robinson v. Webb, 11 Bush, 464. "As a general rule," says Harrison, J., in Emmerson v. Fay, 94 Va. 60, 63, "where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and he employs his own labor, which is subject alone to his control and direction, the work being executed either according to his own ideas or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master, but is an independent contractor, and the fact that his compensation is to be measured by a per diem to himself and those employed by him does not affect the independent character of his employment, nor does the circumstance that his employer is to furnish the materials to be used in doing the work alter his status as an independent contractor, and create the relation of master and servant": See, also, Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703. An independent contractor is one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of his employer only as to the result of his work: Norfolk etc. Ry. Co. v. Stevens, 97 Va. 631, 636; Bibb v. Norfolk etc. Ry. Co., 87 Va. 711; Fink v. Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376; Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703. One who, as an independent business, undertakes to do specific jobs of work, without submitting himself to control as to the petty details, is an independent contractor: Carlson v. Stocking, 91 Wis. 432, 434. The test, therefore, to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished: Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703.

Contractors who have agreed to erect a building of certain materials, and according to fixed plans and specifications, are independent contractors, although the work is to be performed under the inspection, and to the satisfaction, of architects, acting as agents of the owner: Smith v. Milwaukee etc. Exchange, 91 Wis. 360, 51 Am. St. Rep. 912. A person who agrees with a railroad company to construct piers for a bridge over a river, of sizes and forms, in places and of materials, and in accordance with plans and specifications furnished by the company, and to furnish the

materials and perform the work of preparing and keeping in place buoys and lights to warn against danger, is an independent contractor and not an employé of the company: *Casement v. Brown*, 148 U. S. 615. The employment of a mechanic to make repairs upon a building, with no specific arrangement as to terms and conditions, is in the nature of an independent contract: *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703.

An ordinary employé, however, is a servant and not an independent contractor: *Holmes v. Tennessee Coal etc. Co.*, 49 La. Ann. 1465; and stevedores bringing the baggage of passengers on board a steamship, and placing it where requested by the passengers, do not exercise an independent employment: *The Dresden*, 62 Fed. Rep. 438. In general, it may be stated that where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor: *Barg v. Bonsfield*, 65 Minn. 355, 360. What constitutes an independent contractor is a question for the court: *Emmerson v. Fay*, 94 Va. 60; but whether or not a particular person is, under the evidence, an independent contractor is a question of fact for the jury: *Emmerson v. Fay*, 94 Va. 60; *Hass v. Philadelphia etc. S. S. Co.*, 88 Pa. St. 269, 32 Am. Rep. 462. See, also, *Pioneer etc. Co. v. Hansen*, 176 Ill. 100.

General Rule of Nonliability.—In England, over a hundred years ago, A, having a house by the roadside, contracted with B to repair it for a stipulated sum; B contracted with C to do the work, and C with D to furnish the materials. D's servant brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; and it was held that A was answerable for the damage sustained: *Bush v. Steinman*, 1 Bos. & P. 404. This doctrine that an employer is liable for the acts of an independent contractor has been followed to some extent in this country: See cases cited in *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; and compare *Wiswall v. Brinson*, 10 Ired. 554; *Stone v. Cheshire R. R. Corp.*, 19 N. H. 427, 51 Am. Dec. 192; but it has long since been overthrown, and is not the law: *Cunningham v. International R. R. Co.*, 51 Tex. 503, 32 Am. Rep. 632; *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Eaton v. European etc. Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Pawlet v. Rutland etc. R. R. Co.*, 28 Vt. 297. The case of *Bush v. Steinman*, 1 Bos. & P. 404, is no longer the law in England, and "if ever a case can be said to have been overruled, directly and indirectly, by reasoning and by authority, this has been": *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12, and the English cases therein reviewed.

It is a general rule that a party injured by the negligence of an-

other must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable. This principle applies to the negligence of independent contractors, the rule being that the negligence of an independent contractor is not ordinarily chargeable to his employer: *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692. This rule, with its qualifications, may be stated as follows: When an individual or corporation contracts with another individual or corporation, exercising an independent employment, for the latter to do a work not in itself a nuisance *per se* or unlawful, or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not answerable to a third person, or his representatives, for an injury or death which results from the wrongful act or negligence of such contractor, or of his servants, agents, or subcontractors, in the performance of such work: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925; *Frassi v. McDonald*, 122 Cal. 400; *Logansport v. Dick*, 70 Ind. 65, 78, 36 Am. Rep. 166, 174; *Wabash etc. Ry. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696; *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 208; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200; *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912; *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Harrison v. Kiser*, 79 Ga. 588; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Ellis v. Sheffield etc. Co.*, 2 El. & B. 767; *Butler v. Hunter*, 7 Hurl. & N. 826, 833; *Brown v. Accrington etc. Mfg. Co.*, 3 Hurl. & C. 511; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Bailey v. Troy etc. R. R. Co.*, 57 Vt. 252, 52 Am. Rep. 129; *Zimmerman v. Baur*, 11 Ind. App. 607; *Fuller v. Citizens' Nat. Bank*, 15 Fed. Rep. 875; *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912; *Riley v. State Line S. S. Co.*, 29 La. Ann. 791, 29 Am. Rep. 349; *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Clark v. Vermont etc. R. R. Co.*, 28 Vt. 103; *Mayor v. McCary*, 84 Ala. 469; *Morrell v. Rheinfrank*, 24 Fed. Rep. 94; *Smith v. Belshaw*, 89 Cal. 427; *De Forrest v. Wright*, 2 Mich. 368; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Railroad Co. v. Morey*, 47 Ohio St. 207; *Deford v. State*, 30 Md. 179; *Smith v. Benick*, 87 Md. 610; *Robinson v. Webb*, 11 Bush, 464; *Redstrake v. Swayze*, 52 N. J. L. 129; *Knowlton v. Hoit*, 67 N. H. 155; *Manchester v. Warren*, 67 N. H. 482; *Earle v. Hall*, 2 Met. 353; *Connors v. Hennessey*, 112 Mass. 96; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Pye v. Faxon*, 156 Mass. 471, 474; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Morgan v. Bowman*, 22 Mo. 538;

Long v. Moon, 107 Mo. 334; Benjamin v. Metropolitan Street Ry. Co., 133 Mo. 274; Mansfield etc. Coke Co. v. McNery, 91 Pa. St. 185, 36 Am. Rep. 662; Hackett v. Western Union Tel. Co., 80 Wis. 187; Carlson v. Stocking, 91 Wis. 432; Bibb v. Norfolk etc. R. R. Co., 87 Va. 711; Emmerson v. Fay, 94 Va. 60; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Allen v. Willard, 57 Pa. St. 374; Wray v. Evans, 80 Pa. St. 102; Pfau v. Williamson, 63 Ill. 16; Hale v. Johnson, 80 Ill. 185; Du Pratt v. Lick, 38 Cal. 691; Prairie etc. Trust Co. v. Doig, 70 Ill. 52; King v. New York Cent. etc. R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Pierrepont v. Loveless, 72 N. Y. 211. An employer is not responsible for the negligence of the contractor or his servants, when the contractor is given entire freedom in the use of means to accomplish the result: Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 24 Am. St. Rep. 333; Lancaster etc. Imp. Co. v. Rhoads, 116 Pa. St. 377, 2 Am. St. Rep. 608; Wabash etc. Ry. Co. v. Farver, 111 Ind. 195, 60 Am. Rep. 696; Bennett v. Truebody, 66 Cal. 509, 56 Am. Rep. 117; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; and has full control and direction of the work: Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Harrison v. Collins, 86 Pa. St. 153, 27 Am. Rep. 699; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Riedel v. Moran, 103 Mich. 262; Independence v. Slack, 134 Mo. 66; St. Johns etc. R. R. Co. v. Shalley, 33 Fla. 397; Kepperly v. Ramsden, 83 Ill. 354.

In all cases within the general rule above stated, it is the contractor alone who is liable in the event of injury arising from his negligence or that of his servants: Engel v. Eureka Club, 137 N. Y. 100, 33 Am. St. Rep. 692; Pfau v. Williamson, 63 Ill. 16; St. Johns etc. R. R. Co. v. Shalley, 33 Fla. 397; Hughbanks v. Boston Inv. Co., 92 Iowa, 267; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Robinson v. Webb, 11 Bush, 464; note to Brown v. Smith, 22 Am. St. Rep. 463; Du Pratt v. Lick, 38 Cal. 691; Deford v. State, 30 Md. 179; Redstrake v. Swayze, 52 N. J. L. 129; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Wray v. Evans, 80 Pa. St. 102; particularly where he alone is made answerable by the contract: Hughbanks v. Boston Inv. Co., 92 Iowa, 267. The contractor is liable for the negligence of himself or those who aid him: Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703. Under the Wisconsin statute, a contractor for street work, whose negligence causes a defect in a street, whereby a person is injured, is primarily answerable for damages arising from such injury, whether he is an independent contractor or not: Kollock v. Madison, 84 Wis. 458. A contractor and not his employer is answerable for injuries resulting from the doing of acts which may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons are likely to result, provided it is the duty of the contractor,

under the contract, to exercise such care: *Engel v. Eureka Club*, 33 Am. St. Rep. 692. If a contractor reserves the right, in his contract, to examine and reject appliances, and to compel his employer to supply proper appliances, he is not exonerated from liability to one of his employes, who is injured by his failure to exercise due care in this respect: *McCall v. Pacific Mail S. S. Co.*, 123 Cal. 42, 45.

In many cases, it seems to be further required as one of the conditions to relieve the employer from liability, that he shall employ a "fit," "proper," "skillful," or "competent" person as contractor: *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 22, 10 Am. Rep. 205, 208; *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Brown v. Accrington etc. Mfg. Co.*, 3 Hurl. & C. 511; *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608; *Redstrake v. Swayze*, 52 N. J. L. 129; *Mansfield etc. Coke Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Bibb v. Norfolk etc. R. R. Co.*, 87 Va. 711; *Emmerson v. Fay*, 94 Va. 60; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Pfau v. Williamson*, 63 Ill. 16. It is very clear that an employer, not negligent in his selection, is not liable to third persons for a contractor's want of care in the performance of work of which he takes entire control, the employer having no right of supervision or of interference, and that this rule is applicable alike to individuals and corporations: *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608. It is also clear that the owner of property is not liable for injury occasioned by the negligence of a servant of an independent contractor employed by the owner, if the contractor was selected with due care: *Emmerson v. Fay*, 94 Va. 60. But how is it where the principal employs an incompetent contractor? Cases in which the owner was held liable on the sole ground of failing to exercise, with due care, a temporary duty of employing a competent contractor, after which his liability would cease, are exceedingly rare. The language, in many of the cases which impose upon the owner the duty of employing a competent contractor, is apparently mere dictum, at least in instances where no duty is imposed upon the employer by law. In *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, where there was negligence by contractors in the construction of sewers, the jury received the following instruction: "If you find from the evidence that those contractors, or either of them, were unskillful and incompetent to perform the work assumed by them under the contract, and that the borough, knowing this, employed them to do the work, the borough would be negligent in knowingly employing such a person to do the work, and would be responsible for any negligence of such contractor in the same manner that the contractor would be liable for his own negligence"; but the supreme court thought that "this language imposed upon the borough a too limited measure of liability; that

it would be liable, as stated, not only in consequence of negligence, which would certainly be most gross, in knowingly employing incompetent contractors, but also in failing to exercise due and reasonable care to select such as were skillful and competent": Compare *Ware v. St. Paul Water Co.*, 2 Abb. (U. S.) 261. But in *Hunt v. Pennsylvania R. R. Co.*, 51 Pa. St. 475, 482, Agnew, J., in rendering the opinion of the court, said: "I am not aware that it was ever held in any case that one who employs a contractor to erect a building, or to do any other mechanical work, becomes a guarantor to all the employ  s of the contractor for his skill and care in performing the work." And, even in a case where the work of tearing down an old building was dangerous, by reason of decay, and a servant of the contractor, engaged to tear it down, was injured by reason of the latter's incompetency while engaged in the work, it was held that the owner was not liable to the servant, although he knew, when he let the contract, that the work was dangerous and that the contractor was personally incompetent to superintend it: *Schip v. Pabst Brewing Co.*, 64 Minn. 22.

The general rule above stated, as to the nonliability of an employer for the acts of an independent contractor, applies, of course, where the purpose of the contract is lawful and where the owner of the property on which it is to be executed can lawfully commit the work to others: *Allen v. Willard*, 57 Pa. St. 374; *Wray v. Evans*, 80 Pa. St. 102. The fact that a structure built by a contractor is built upon land of the employer does not make the latter any more liable for injuries occurring in its progress than if it were erected elsewhere: *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. A principal is not answerable for the wrongful act or trespass of an independent contractor employed by him: *New Orleans etc. R. R. Co. v. Reese*, 61 Miss. 581; *Davison v. Shanahan*, 93 Mich. 486; unless it is a part of the contract: *Andrews v. Runyon*, 65 Cal. 629; but the question as to whether an owner can be held answerable for damages caused by the unauthorized act of a builder or contractor cannot arise until the question of fact whether the act was, or was not, authorized by the owner is first disposed of and settled: *Gilbert v. Beach*, 16 N. Y. 606, 608.

While the contractor alone, and not his employer, is generally liable in cases where work is carried on under an independent employment, this rule of liability is limited to those injuries which are collateral to the work to be performed, and which arise from the negligence or wrongful act of the contractor or his agents or servants. Acts "collateral" to the work contracted for are to be distinguished from those which the contractor expressly agrees and is authorized to do, and from which injury directly results: *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225; *Circleville v. Neuding*, 41 Ohio St. 465, 469; *Hundhausen v. Bond*, 36 Wis. 29; *Railroad Co. v. Morey*, 47 Ohio St. 207; *Mayor v. McCrary*, 84

Ala. 469; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274. Thus, where masons work as independent contractors in erecting a party-wall, they alone are answerable to a third person for an injury caused by their negligence in a matter collateral to the contract, as, for instance, in depositing materials, handling tools, or constructing temporary safeguards, while doing the work; but where the very thing contracted to be done is improperly done, and causes injury, the employer is answerable for it, at least when the injury occurs after his acceptance of the work: *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; but compare *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200. That the employer's nonliability for the acts of an independent contractor is not affected by the fact that the contractor is employed by the day, with no fixed price agreed upon, or that his compensation is measured by a per diem to himself and those employed by him, or that the employer is to furnish the materials to be used in doing the work, see *Fuller v. Citizens' Nat. Bank*, 15 Fed. Rep. 875; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Mansfield etc. Coke Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Emmerson v. Fay*, 94 Va. 60.

Illustrations of Employer's Nonliability Where the Contractor Has Control.—The owners of a crane used in loading and unloading vessels, are not answerable for its negligent use by contractors who have borrowed it and who have control of it: *Donovan v. Laing*, [1893] 1 Q. B. 629. The owner of a building, in charge of independent contractors, is not liable for the negligence of the employés of the contractors, whereby a brick falls from the uncompleted building and injures one who is passing on the sidewalk: *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912. The owner of a portable steam-engine contracted with a railroad company to pump the water from an excavation on the land of the company near the highway. The plaintiff, driving on the highway, was injured by reason of his horse's fright at the engine, and it was held that the defendant company, having no control over the use of the engine, was not liable: *Wabash etc. Ry. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696. The plaintiff was injured by the carelessness of men occupied in repairing the roof of defendant's building. The men were employés and under the orders of one who carried on the business of slating roofs, and who was engaged by the defendant to do the job in question. It was held that the slater carried on an independent employment and that the defendant was not answerable: *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320. The owner of a building, employing a plumber to repair the water pipes in his own way, is not liable for an injury produced to a third person by his negligence in that work: *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117. The defendant contracted to have T. cut timber from the defendant's land, at a specified price per foot, and de-

liver it at the mouth of a certain river, using the defendant's dams in the driving of the logs, if he chose. T. used the defendant's dam in the business in an unreasonable manner, to the plaintiff's injury, but the defendant had nothing to do with the cutting, hauling, or driving of the logs, and it was held that the defendant was not answerable: *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572. If a contractee furnishes tools to a contractor with which to do the work agreed, and they are suitable and safe when furnished, the contractee is not liable for any injury happening from the lack of repair in the absence of an express agreement on his part to keep the tools in repair. And if the contractee agrees to repair the tools when notified that they need it, his duty will not arise until such notice is given: *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. The owners of a sugar refinery employed a rigger to remove machinery from a railroad car to their refinery. In doing the work the rigger opened a coal hole in the sidewalk, and left it open a few minutes after the work was finished. A lad fell into the hole and was injured. The rigger was paid by the day, and the owners of the refinery neither directed nor interfered with the manner of the work. It was held that they were not answerable for the injury: *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699. The contractors, and not the employers, are liable for injuries caused by the bursting of a dam before its completion and acceptance by the employers, when the contractors are architects of reputed skill and experience, and the employers exercised no control or supervision of the work, but the contract was merely that the contractors should construct and deliver a dam of certain dimensions and strength within a specified time, for a stipulated sum: *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. The relation of master and servant does not exist between the owner of land and a carpenter, over whom he has no direction or control, and whom he employs to alter and repair certain buildings and furnish the materials therefor for a specified price; their relation is that of employer and contractor, and such land owner is, therefore, not liable for damage resulting to a third person, from the deposit by a teamster employed by such carpenter of boards intended to be used in such alterations and repairs in the highway in front of such land: *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743. A lot owner is not liable for injury caused by the negligence of servants of a contractor engaged by him, under a permit from the city, to make a sewer in the street at a fixed price for the whole work, the contractor being a competent person and having entire control, where the workmen negligently leave the excavation unguarded and unlighted at night, and a passerby falls into it, but the contractor is the party answerable: *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304. A telegraph company, which employs a railroad company, as an independent contractor, to construct its line, the latter company furnishing the materials

and labor, and employing a foreman, who has full charge of the work, is not answerable for injuries arising from the negligence of the railroad company in digging a post hole in a public street, and leaving it unguarded at night: *Hackett v. Western Union Tel. Co.*, 80 Wis. 187. The owner of an implement or piece of machinery may lawfully allow another to take and use it, and if, in using it, it becomes defective, and causes injury to a third person, the owner is not answerable for such injury, although the right to use the thing was given under a contract whereby it was to be used in performing work for the owner upon his own premises: *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. Compare *Donovan v. Laing*, [1893] 1 Q. B. 629. An owner of premises is not answerable for a contractor's neglect of duty, while making an excavation thereon, in making necessary safeguards, where the contractor has exclusive control of the work, and possession of the place where the excavation is being made: *Kepperly v. Ramsden*, 83 Ill. 354. One who employs an independent contractor to cut trees on his land is not answerable, where the contractor has control of the work, for the latter's negligence in cutting and felling the trees upon another's land, whereby injury results: *Knowlton v. Hoit*, 67 N. H. 155. If a principal contractor is to do the labor and furnish the materials for the erection of a building, and has charge of the work, the owner is not answerable for the negligent conduct of the workmen engaged in the use of machinery, or for any other negligence on their part: *Prairie etc. Trust Co. v. Dolg*, 70 Ill. 52. If a coal company, as an independent contractor, delivers coal through a scuttle hole in the sidewalk, the property owner, not having any power or control over the contractor, is not answerable for the company's negligence in performing its contract, but this would be so only while the coal is being delivered through the hole: *Benjamin v. Metropolitan Street Ry. Co.*, 133 Mo. 274, 284. While owners are engaged in the improvement of their property adjacent to a public street, it is not their duty, either to the city or to the public, to see that no obstructions to travel are placed in the street, or suffered to remain therein, by independent contractors, who have charge of the work. Hence, if a contractor agrees to construct a sidewalk, for the owner, for a fixed price, the owner, where he retains no power of direction or control as to the work, is not answerable for a negligent obstruction of the street by the contractor: *Independence v. Slack*, 134 Mo. 66. For further illustrations, in the same line as the above, see *Brown v. Accrington etc. Mfg. Co.*, 3 Hurl. & C. 511; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Pye v. Faxon*, 156 Mass. 471; *De Forrest v. Wright*, 2 Mich. 368; *Connors v. Hennessey*, 112 Mass. 96; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Manchester v. Warren*, 67 N. H. 482; *Earle v. Hall*, 2 Met. 353; *Wood v. Cobb*, 13 Allen, 58; *Humpton v. Unterkircher*, 97 Iowa, 509; *Riedel v. Moran*, 103 Mich. 262.

Collateral Injuries—Trespass and Wrongful Acts—Illustrations.—An Employer is not Liable for street obstructions or defects, caused by the wrongful acts of a contractor or his workmen, when they are only collateral to the work contracted for: *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225; *Hundhausen v. Bond*, 36 Wis. 29, 40. If a scaffolding is suspended from the eaves of a house near a public street, for the purpose of repairing and improving the building, it being put there by an independent contractor, who had contracted to do the work, and a gust of wind causes a plank to fall from the scaffolding, which, rebounding on the sidewalk, strikes a person and injures him, such injury results, not from anything contracted for by the owner of the property, but something collateral thereto. It is not the result of an act absolutely necessary for the contractor to do in order to accomplish the desired end: *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703.

An employer is not answerable for the wrongful act of a contractor in taking trees from another's land to procure material to be furnished under his contract: *New Orleans etc. R. R. Co. v. Reese*, 61 Miss. 581. If a contractor, while erecting a house for the owner, commits acts of trespass upon an adjoining lot, the owner is not answerable therefor, where he neither committed, authorized, nor directed the acts complained of. He is not liable merely because he owns the lot upon which the building is being erected: *Davison v. Shanahan*, 93 Mich. 486. If a contractor, in repairing a levee near a highway, removes earth from the highway for use in making such repairs, his employer is not answerable for his illegal act, unless it was a part of the contract to build the levee with dirt taken from the road: *Andrews v. Runyon*, 65 Cal. 629. A city is not liable for the unauthorized trespass of an employé of an independent contractor, who has a contract for the construction of a sewer: *Harding v. Boston*, 163 Mass. 14, 19. If an independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages for the injury: *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200; but see *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224. When a person employs another to do a lawful act, the presumption is that he was employed to do it in a lawful manner, and, where the relation of contractee and independent contractor exists between the parties, the contractee is not answerable for the negligent manner in which the act is done: *Butler v. Hunter*, 7 Hurl. & N. 826.

The Relation of Master and Servant must, in fact, exist between two persons in order to make one of them answerable for the negligence of the other, as this relation is the only basis upon which such liability can rest. The law does not impute to one person the negligent act of another unless the relation of master and ser-

vant, or principal and agent, exists: *Stevens v. Armstrong*, 6 N. Y. 435; *Robinson v. Webb*, 11 Bush, 464; *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *School Dist. v. Fuess*, 98 Pa. St. 600, 42 Am. Rep. 627; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Emmerson v. Fay*, 94 Va. 60; *Allen v. Willard*, 57 Pa. St. 374. An independent contractor is not, in a legal sense, a servant of his employer: *Indiana Iron Co. v. Craig*, 19 Ind. App. 565; *Robinson v. Webb*, 11 Bush, 464; but in determining the liability of an employer in the class of cases discussed in this note it sometimes becomes a very delicate question to determine whether a workman, under some circumstances, is a servant, or an independent contractor. When that question is settled the problem is solved, for the rule of liability in either case is clear. It is not our purpose here to enter into any minute treatment of the question as to when the relation of master and servant exists, for that is discussed in the extended note to *Brown v. Smith*, 22 Am. St. Rep. 459-468. The question in these cases, whether the relation is that of master and servant, or contractor and contractee, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor: *Forsyth v. Hooper*, 11 Allen, 459, 421.

One who contracts with another to do a specific piece of work for him, which work is lawful in its nature, and who furnishes and has the absolute control of his assistants, and who executes the work entirely in accord with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, with absolute control thereof, is not a servant of his employer, but is an independent contractor, and a person injured by his negligence in the performance of the work has no right of action against the party for whose benefit the work is done. In other words, neither an independent contractor nor his assistants are the servants of the party with whom he contracts, and the only question to be determined in fixing the liability is as to who has the control of those employed in the work, and control of the manner in which it is done. If one contracts with another to perform lawful work without reserving any control of those employed in the work, or the manner in which it is to be done, the contractor who controls and directs those engaged in the work, and not the party for whom it is done, is the master, and liable for their negligence. If, however, the party for whom the work is done reserves such control, he is liable as the master: Note to *Brown v. Smith*, 22 Am. St. Rep. 463. See, also, *Morgan v. Smith*, 159 Mass. 570, 574.

If the party for whom work is done by another reserves direction and control of it, the workman is a servant, and not an independent contractor: *Stone v. Codman*, 15 Pick. 297, 299; *Hughbanks v. Boston Inv. Co.*, 92 Iowa, 267, 274; *Drennen v. Smith*, 115 Ala.

396; Chicago etc. Gas Co. v. Myers, 168 Ill. 139; Rahn v. Singer Mfg. Co., 26 Fed. Rep. 912; Whitson v. Ames, 68 Minn. 23, 26; Sadler v. Henlock, 4 El. & B. 570; Atlantic Transport Co. v. Coneys, 82 Fed. Rep. 177; St. Johns etc. R. R. Co. v. Shalley, 33 Fla. 397, 404. The mode of payment is not a criterion by which to determine whether the relation of master and servant exists, although it is a circumstance entitled to weight in a case of doubt, and no distinction can be drawn from the circumstance that an employé is paid by the day instead of by the job: Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63; New Orleans etc. R. R. Co. v. Reese, 61 Miss. 581; Morgan v. Smith, 159 Mass. 570, 574; Sadler v. Henlock, 4 El. & B. 570. The relation of master and servant exists, instead of contractor and employer, where, under a written contract, the entire order, method, and plan of the work is subject to the control of the latter under a clause in such contract providing that the work of demolition of a building "is to be carried out according to the directions of the supervising architect, whose decisions on all points" the contractor agrees to accept as final: Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256.

On the other hand, if the employé is exercising an independent employment, under a contract to do certain work by his own methods, without subjection to the control of his employer, except as to the product or result of the work, he is an independent contractor, and not a servant: Indiana Iron Co. v. Cray, 19 Ind. App. 565, 577; Deford v. State, 30 Md. 179; Morgan v. Smith, 159 Mass. 570, 574; Hale v. Johnson, 80 Ill. 185. Thus, one who operates a shingle machine, getting out shingles by the thousand, for the owners or lessees of a mill, is a contractor, and not a servant for whose acts the owners or lessees are answerable: State v. Emerson, 72 Me. 455. So one who contracts with a furnace company to dig sand on its land and draw to its furnace at a fixed price per load, there being no provision as to the manner of the performance of the work, is an independent contractor, and not a servant for whose negligence the company is answerable: Fink v. Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376. A contractor in full control of the repairs on a building, using his own means and methods for doing the work on a plan adopted before he made his contract, is not a servant of the owner of the building, and the latter is not, therefore, answerable to third persons for his negligence: Jefferson v. Jameson etc. Co., 165 Ill. 138, 142; and a person who contracts with a business house to do all of its hauling and delivery work at a specified sum per week, but retains full control over the teams, wagons, and drivers furnished by himself, is a contractor, and not a servant. Hence, the house is not answerable for an injury which occurs through the negligent driving of a wagon, though its name and address are painted thereon: Foster v. Wadsworth-Howland Co., 168 Ill. 514. A person employed to cut logs off of certain premises belonging to his employer, and who agrees to deliver them to

the employer at a certain place, is alone answerable for any damage caused by floating the logs down to such point of delivery, as the relation of master and servant does not exist between the parties: *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209. If a servant falls down through an elevator shaft, and is injured, during the course of its construction by contractors, who are exercising an independent employment, the master is not liable for the injury: *Conway v. Furst*, 57 N. J. L. 645; and an owner, or principal contractor, or master workman, is not answerable for damage occasioned by the wrongful acts of persons employed by a subcontractor or under-workman, or by a person carrying on a distinct independent employment, because they are not his servants, and do not act for him, but for their immediate employer: *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49. It is said that the relation of contractor excludes that of principal and agent or master and servant, in all ordinary transactions; but that there is not necessarily such a repugnance between them that they cannot exist together; and it is held that the relation of contractor and of principal and agent must necessarily exist together, where one contracts with a municipal corporation to construct a sewer through one of its streets: *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78.

The Doctrine of Respondeat Superior does not, as a general rule, apply to an independent contractor: *Barton v. McDonald*, 81 Cal. 265; *O'Hale v. Sacramento*, 48 Cal. 212; *Du Pratt v. Lick*, 38 Cal. 691; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Deford v. State*, 30 Md. 179; *Cincinnati v. Stone*, 5 Ohio St. 38; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Knowlton v. Hoit*, 67 N. H. 155; *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 66 Am. St. Rep. 537; *Crisler v. Ott*, 72 Miss. 166; *Clark v. Hannibal etc. R. R. Co.* 36 Mo. 202; compare *Mayor v. McCary*, 84 Ala. 469. It applies only to cases where the relation of master and servant exists, and the same is true of the rule of *qui facit per alium, facit per se*: *Bibb v. Norfolk etc. R. R. Co.*, 87 Va. 711; *Callahan v. Burlington etc. R. R. Co.*, 23 Iowa, 562; *Kellogg v. Payne*, 21 Iowa, 575; *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 66 Am. St. Rep. 537; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78. Thus, where a city retains charge of work done by contract and the contractors are servants of the city, the doctrine of *respondeat superior* applies: *Chicago v. Dermody*, 61 Ill. 431; *Chicago v. Joney*, 60 Ill. 383. The doctrine of *respondeat superior*, when applied to employer and employé, or to master and servant, rests on the maxim, *Qui facit per alium, facit per se*, but that doctrine has no application to a job let out to a building contractor: *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719. The doctrine of *respondeat superior* and the maxim, *Qui facit per alium*,

etc., are explained in *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304. See, also, *Whitson v. Ames*, 68 Minn. 23, 26; *Bibb v. Norfolk etc. R. R. Co.*, 87 Va. 711.

One superior only is liable for the same subordinate, and that is the immediate superior: *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Wray v. Evans*, 80 Pa. St. 102. Hence, where work is done under an independent employment, the rule of respondeat superior applies only to the contractor, as between him and the contractee: *Clark v. Hannibal etc. R. R. Co.*, 36 Mo. 202; *Wray v. Evans*, 80 Pa. St. 102. It does not apply between the contractee and a subcontractor: *Zimmerman v. Baur*, 11 Ind. App. 607. A subcontractor, who furnishes the material to be used, and who retains direction and control over the work and men he employs, is himself answerable for the negligence of his employés, under the rule of respondeat superior: *Pioneer etc. Co. v. Hansen*, 176 Ill. 100. In Illinois, an employer who does not have the power of discharging the party whose negligent act occasioned the injury, cannot, under the doctrine of respondeat superior, be held answerable as master: *Pioneer etc. Co. v. Hansen*, 176 Ill. 100.

If, however, the work is "intrinsically" dangerous, the rule may be applied. Thus, if a city employs one by contract to do work intrinsically dangerous, such as the blasting of rock in a public street, and while the contractor is using due care, a rock is thrown by the blast against a person's windows and breaks them, the city is answerable for the injury: *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17. So the doctrine may be applied where a contractor with a city allows a nuisance to be created, for which he is answerable to travelers on a street for injury caused thereby, although such nuisance is created by a subcontractor having an independent contract under the contractor with the city: *Colgrove v. Smith*, 102 Cal. 220.

A Contractee is Answerable Where He Reserves Direction and Control. An employer may make himself liable for the negligence of an independent contractor by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of all or part of the work, so that the relation of master and servant arises, or so that the injury is traceable to his interference. When this occurs, the employer is answerable. In other words, a contractee, and not the independent contractor, is liable for injury to third persons which arises from negligence of the contractor, or of his servant or agent, in doing the work, where the contractee retains and exercises the right to direct the manner in which the details of the work shall be performed: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71, 91, on the acts of a servant for which a master is not answerable: *First Presbyterian Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808; *Roddy v. Missouri Pac.*

Ry. Co., 104 Mo. 234, 24 Am. St. Rep. 333; *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225; *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Brackett v. Lubke*, 4 Allen, 138, 81 Am. Dec. 696; *Fuller v. Citizens' Nat. Bank*, 15 Fed. Rep. 875; *McGough v. Ropner*, 87 Fed. Rep. 534; *Cincinnati v. Stone*, 5 Ohio St. 38; *McDonell v. Rifle Boom Co.*, 71 Mich. 61; note to *Brown v. Smith*, 22 Am. St. Rep. 463; *Mumby v. Bowden*, 25 Fla. 454; *St. Johns etc. R. R. Co. v. Shalley*, 33 Fla. 397; *Matthews v. West London etc. Co.*, 3 Camp. 403; *Morgan v. Bowman*, 22 Mo. 538; *Burton v. Galveston etc. Ry. Co.*, 61 Tex. 526.

An employer is liable for damage which ensues to another by reason of something having been done, as part of the work contracted for, in consequence of the employer's interference in such work, or any of its details: *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225. An employer is answerable to the servant of a contractor, where such servant sustains an injury resulting from the personal interference and control, by the employer, of the work, or some part of it: *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256. A contractee is not answerable for the negligence of an independent contractor, unless he interferes with and assumes actual control over the work and the methods and means of its performance: *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; but where the owner of premises is erecting buildings thereon, and assumes control of the foundation stones as they come from the cart which delivers them, or directs the contractor where to put them, he may be held answerable for negligence respecting them, although, without such interference, the contractor alone would be liable: *Mahar v. Steuer*, 170 Mass. 454, 456. The question as to the fact of interference is one for the jury: *Pender v. Raggs*, 178 Pa. St. 337.

It is to be observed that a contractee is not liable where his power to direct or control the work is confined to results: Note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 91. So mere supervision to ascertain that the contractor performs his contract, or reserving the right to dismiss incompetent workmen, will not render the contractee liable: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Harrison v. Kiser*, 79 Ga. 588. Contractors are independent, although the work is to be performed under the inspection and to the satisfaction of architects acting as agents of the owner: *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912. The supervision of a work of construction may be retained without interfering with the independent action or liability of contractors who have engaged to execute either the whole or a part of it; but where the contract under which an excavation is made for the foundations of a house declares that it shall be carried to such general depth, and that the operations shall proceed at such times, and to such extent as the representa-

tive of the land owner may require, any injuries caused to an adjoining house in consequence of making the excavations in strict pursuance of the orders of such representative will be deemed to have been due to the exercise of the discretion or judgment vested in the supervising authority; and for that exercise of judgment the land owner must respond: *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439. A contractee's reservation of the privilege of inspecting and supervising the work of a contractor does not impair the latter's character as an independent contractor: *Bibb v. Norfolk etc. R. R. Co.*, 87 Va. 711, 748. If a portion of a building contract is sublet, the contractor does not become the master of the subcontractor's employés, and answerable for their negligence, merely because he retains power to inspect the work, to see that it is honestly done: *Pioneer etc. Co. v. Hansen*, 176 Ill. 100. An owner of property has not so far given its control to a contractor for building as to be relieved from liability for the contractor's negligence, where, by the terms of the contract, the builder is to carry forward the work under the control of a superintendent, and "to remove all improper work or materials upon being directed to do so by the superintendent," to whose judgment, both as to work and materials, he agrees to submit, and whose acts the owner agrees to recognize, and the owner also reserves the right to change his plan, and the architect is declared to be the superintendent for the owner: *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227. So a provision in a building contract, that the work is to be done under the direction of the owners and their architect, and to their entire satisfaction, approval, and acceptance, does not make the owners liable for any injury which may happen to the servants or employés of the contractors, through the negligence of the latter or their servants: *Humpton v. Unterkircher*, 97 Iowa. 509, 516. Such provisions, as well as those permitting the owner to make alterations, deviations, additions, or omissions, from the contract, do not make the contractors the servants of the owner: *Frassi v. McDonald*, 122 Cal. 400; *Harding v. Boston*, 163 Mass. 14. So, if contractors enter into an agreement with a county to furnish the material and direct and set up a stone curb upon a line dividing a park from the pavement of a much used public street, and the contract contains a provision that the contractors shall not throw ground, stone, or any other rubbish on the grass, the fact that the commissioners direct that dirt shall not be thrown upon the grass, and furnish boards upon which the dirt may be deposited, does not make the county answerable for the negligence of the contractors in heaping the dirt upon the pavement and leaving it unguarded and unlighted during the night: *Eby v. Lebanon Co.*, 166 Pa. St. 632. A provision in a contract for the construction of a sewer in the city of Boston, that "none but citizens of Boston" are to be employed on the work, does not give to the city the selection of the laborers in any such sense as to make them its servants: *Harding v. Boston*,

163 Mass. 14. Where the captain of a boat is acting as the servant of its charterer, the owner may inspect the boat, to ascertain its condition, without becoming liable for the captain's negligence: *Anderson v. Boyer*, 156 N. Y. 93.

A city which retains charge of a work done by contractors must answer for the manner in which it is performed: *Chicago v. Dermody*, 61 Ill. 431; *Chicago v. Joney*, 60 Ill. 383; and where a contractor agrees with the trustees of an estate to take down a building for them carefully, and under their direction and subject to their approval, such trustees must respond in damages for injury to a third person caused by the contractor's negligence in the work: *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. If a boom company has control of a stream and the dams thereon, and lets a contract for driving logs therein, it is liable for damage done to riparian proprietors, where the reasonable performance of the contract obliges the contractor to so run and manage the logs and water as to injure such owners: *McDonell v. Ride Boom Co.*, 71 Mich. 61, 65. A county is not answerable for an injury caused by the negligence of an independent contractor, if its commissioners have not so interfered with the work as to control its methods and thus become, in spite of the contract, the responsible master: *Eby v. Lebanon County*, 166 Pa. St. 632, 634.

A Contractee is Answerable Where the Work Causes a Nuisance. When work is wrongful in itself, or if done in the ordinary manner must result in a nuisance, the employer is liable for injury resulting to third persons, although the work is done by an independent contractor: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200; *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Ware v. St. Paul Water Co.*, 2 Abb. (U. S.) 261; *City etc. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345; *Overton v. Freeman*, 11 Com. B. 867; *Koch v. Sackman etc. Inv. Co.*, 9 Wash. 405; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Congreve v. Smith*, 18 N. Y. 79, 83; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Moore v. Townsend*, 76 Minn. 64; *Spence v. Schultz*, 103 Cal. 208; *Darmstaetter v. Moynahan*, 27 Mich. 188; *Robbins v. Chicago*, 4 Wall. 657, 679; affirming *Chicago v. Robbins*, 2 Black, 418.

Thus, blasting with gunpowder in a city or town is a nuisance, unless proper precautions are taken to prevent injury to such property, or to the persons of others ignorantly coming within its reach: *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200. One is liable for damages caused by a public nuisance, which he permits to be established on property under his control, although incidental to a work otherwise lawful, or erected by an independent contractor: *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225; *Clark v. Fry*,

8 Ohio St. 358, 72 Am. Dec. 590. An unprotected excavation in the sidewalk of a populous street in a city is "so dangerous a pitfall as to be, in its character, of the nature of a nuisance," and he who causes it to be done, knowing beforehand its nature and character, cannot escape liability to one who innocently falls into it, upon the ground that he let out the job of creating the nuisance to a contractor: *Spence v. Schultz*, 103 Cal. 208, 212. A person who, without special authority, procures contractors to make or continue a covered excavation in a public street or highway for a private purpose, is answerable for an injury occurring from the unsafe condition of the street or highway, where there was no negligence by the person injured, although the contractee may have used the utmost care to prevent injury. His obligation to the public was to keep the street as safe as before the excavation was made: *Congreve v. Smith*, 18 N. Y. 79, 82. So, if the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked: *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408. If a person employs one to fill his icehouse by the cord, he cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of ice, on the ground that his employé was an independent contractor, although the contractee had obtained a permit from the city authorities to encumber the street for the accomplishment of his object: *Darmstaetter v. Moynahan*, 27 Mich. 188. An owner or occupant of a building in a city cannot relieve himself of the continuing duty which he owes to the public not to create or maintain a public nuisance on his premises by employing an independent contractor to paint the building. Neither can the city absolve itself of a like duty in respect to permitting a nuisance to be maintained, partly or wholly, in its streets. Hence, where an independent contractor has completed the painting of the building, and leaves a long ladder in position, the lower end resting in the street, outside the sidewalk, inclined over and across the walk, the upper end resting upon the building, and the ladder falls, during a high wind, upon a person passing along the street, injuring him, the proximate cause of the injury is the fall of the ladder and not the high wind, and, as the ladder thus standing caused a public nuisance, it seems that neither the owner nor city would be absolved from liability for its maintenance: *Moore v. Townsend*, 76 Minn. 64.

While the owner or occupant is liable for injuries to third persons caused by a nuisance which necessarily occurs in the ordinary mode of doing contract work, the contractee is not ordinarily answerable for such injuries, where they were caused by a public nuisance unnecessarily committed by the contractor in the prosecution of his work, or where the nuisance was not necessarily inci-

dent to the work and occurred through the mere negligence of the contractor or that of his servants, especially if the contractee is not in control of the work and has no power to prevent the nuisance: *Peachey v. Rowland*, 13 Com. B. 182; *Chicago v. Robbins*, 2 Black, 418; affirmed in *Robbins v. Chicago*, 4 Wall. 657; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Gwathney v. Little Miami R. R. Co.*, 12 Ohio St. 92; *Robinson v. Webb*, 11 Bush, 464. The contractee is not liable where the thing complained of is not necessarily a nuisance: *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Bailey v. Troy etc. R. R. Co.*, 57 Vt. 252, 52 Am. Rep. 129; *Smith v. Simmons*, 103 Pa. St. 32, 49 Am. Rep. 113; *Robinson v. Webb*, 11 Bush, 464; *City etc. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205. The use of a steam-engine by an independent contractor on a turnpike road for hauling materials to be used in repairs or improvements is not a nuisance per se, and does not render a turnpike company, for whom the work is being done, liable to a third person for the negligence of the servants of such independent contractor: *City etc. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345. If the act contracted to be done is in itself lawful, and the contractee has no reason to believe that it is a nuisance, but it turns out that during the progress of the work it is necessary to create a nuisance in order to do it, the contractee is not liable for injuries to third persons resulting from the nuisance before he has notice of its existence. Upon receiving such notice he must take such reasonably prompt and efficient means as are in his power to suppress the nuisance to relieve himself from liability for subsequent injuries to third persons: *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200. A railroad company which has employed an independent contractor to construct its road, retaining no control over him, except to see that the road is built according to contract, is not liable for an injury resulting from a nuisance created by such contractor not necessarily incident to the construction of the road; and if the company is not aware of the existence of the nuisance, and the possession of the road has not been delivered to it at the time of the injury complained of, there is no such ratification of the contractor's wrongful acts as will render it liable therefor: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231.

A Contractee is Answerable Where the Work is Dangerous.—When the owner of premises, which are under his control, employs an independent contractor to do work upon them which, from its nature, is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved, by reason of the contract, from the obligation of seeing that due care is used to protect such persons: *Curtis v. Kiley*, 153 Mass. 123, 126. Where, according to previous knowledge and experience, the work to be done by an independent contractor is, in its nature,

dangerous to others, the employer, and not the contractor, is liable for an injury inflicted in the performance of the work: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. When work to be performed is necessarily dangerous, and an obligation rests on the employer to keep the place of the work in a safe condition, he is answerable for injury resulting from the dangerous condition in which the work is left, though it is being done for him by an independent contractor: *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432; *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39; *Whitney v. Clifford*, 46 Wis. 138, 32 Am. Rep. 703; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Robbins v. Chicago City*, 4 Wall. 657; *Wiggin v. St. Louis*, 135 Mo. 558. Thus, if an independent contractor is erecting a building, under a contract which requires him to make excavations for the building adjacent to the sidewalk, and he neglects to guard such excavations, the owner is answerable for injuries to pedestrians arising from such neglect: *Wiggin v. St. Louis*, 135 Mo. 558. In some cases, however, particularly in New York, a contractee is held not liable, unless the work is "intrinsically" dangerous. This is upon the doctrine that, if injuries result from the doing of acts which may be safely done in the exercise of due care, he who occasions them must respond therefor, although, in the absence of such care, injurious consequences to third persons are likely to result; and the stricter, and probably better, rule arising out of this view is, that where the work contracted to be done, however carefully and skillfully performed, is necessarily and "intrinsically" dangerous, the contractee is answerable, equally with the contractor, for injuries resulting directly and necessarily from the acts authorized to be done; but that this rule of the contractee's liability should not extend to injuries which are not a necessary result of the work, but which are caused by the negligent act of the contractor or his servants, and for which the contractor alone should be held liable: *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Mayor v. McCary*, 84 Ala. 469, 472; *Berg v. Parsons*, 156 N. Y. 109, 66 Am. St. Rep. 542; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Pierrepont v. Loveless*, 72 N. Y. 211; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495. Compare the subdivisions, *infra*, which point out the employer's liability for negligence in allowing fire to spread, in blasting, in tearing down buildings and walls, and in withdrawing lateral support. A city is answerable to a person suffering injury from the negligent act of its contractor, if the contract required the performance of work which was "intrinsically" dangerous, however successfully done: *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17.

A Contractee is Answerable Where the Work Necessarily Produces Injury to Third Persons.—If work is done under contract, and a resulting injury, instead of being collateral and flowing from the negligent act of the employé alone, is one that might have been antici-

pated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance, the contractee must respond for such injury, though it was occasioned by the negligence of an independent contractor's employé: *Railroad Co. v. Morey*, 47 Ohio St. 207, 217; *City etc. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345. The contractee is answerable where the injury is the direct result of the work, and will necessarily bring wrongful consequences to pass unless he guards against them. In other words, if the carrying out of a lawful contract is necessarily injurious to a third person, the contractee must answer therefor: *Williams v. Fresno etc. Irr. Co.*, 96 Cal. 14, 31 Am. St. Rep. 172; *Wertheimer v. Saunders*, 95 Wis. 573, 579; *Carlson v. Stocking*, 91 Wis. 432; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Pye v. Faxon*, 156 Mass. 471, 474; *Hundhausen v. Bond*, 36 Wis. 29; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590. As said in *Robbins v. Chicago*, 4 Wall. 657, 679, "where the obstruction or defect which occasioned the injury results 'directly' from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." Hence, if the injury results from an excavation having been made in a street at the direct instance of a lot owner, even with an independent contractor for that purpose, the lot owner is liable: *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470. So a contractee is answerable for the act of a contractor in plowing up the land of a third person, and using part thereof in constructing or repairing a canal, if it appears that it was a part of the contract that the work should involve the using of such land: *Williams v. Fresno etc. Irr. Co.*, 96 Cal. 14, 31 Am. St. Rep. 172.

A Contractee is Answerable Where the Precise Thing Ordered to be Done Causes Injury.—If a contractor does the thing which he is employed to do, the contractee is liable for it as if he had done it himself: *Ellis v. Sheffield Gas etc. Co.*, 2 El. & B. 767, 769; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399. Hence, if the act contracted for and done by the contractor or his servants is, in itself, wrongful or unlawful, the contractee is answerable for it to third persons who are injured thereby: *Ellis v. Sheffield Gas etc. Co.*, 2 El. & B. 767, 769; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399, 417; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Ware v. St. Paul Water Co.*, 2 Abb. (U. S.) 261; *Dorrity v. Rapp*, 72 N. Y. 307; *Crisler v. Ott*, 72 Miss. 166; *Darmstaetter v. Moynahan*, 27 Mich. 188.

Thus, a person has no right to use even his own lands, or to authorize others to use them, so as to interfere with the undisturbed possession and lawful enjoyment of adjoining lands. Hence, if

he employs blasters to remove rock therefrom, some fragments of which are thrown against the dwelling of an adjoining proprietor, causing an injury, the contractee is liable therefor, though the rock was removed without carelessness on the part of the contractors: *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399, 417. The contractee is liable when the act required to be done by the contractor is such as obviously exposes other persons or property to unusual peril: *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495. He must respond for injuries caused by contractors blasting in violation of an ordinance: *Brannock v. Elmore*, 114 Mo. 55. So, if the making and maintenance of an excavation in a sidewalk is unlawful, because a city ordinance on the subject has not been complied with, the owner of the premises cannot avoid the duty of complying with the ordinance by letting the work to an independent contractor: *Spence v. Schultz*, 103 Cal. 208; and, if a person, not knowing the boundary lines of his own land, negligently employs an independent contractor to cut trees, which are on the land of a third person, the contractee is liable: *Crisler v. Ott*, 72 Miss. 166. His liability does not rest upon the principle of respondeat superior, but upon the fact that he is a cotrespasser with the independent contractor: *Crisler v. Ott*, 72 Miss. 166, 169. If the entry of the state upon land, and its direction to a contractor to excavate and remove stone therefrom, are wrongful or a trespass, the state must respond for all trespasses committed by the contractor with the knowledge and acquiescence of its agents in executing the contract: *Coleman v. State*, 134 N. Y. 564, 567. That the business of rafting logs, in pursuance of a contract, is not, of itself, unlawful or dangerous to third persons, see *Pierrepoint v. Loveless*, 72 N. Y. 211.

A Contractee is Answerable Where His Own Plans are Followed.—An employer is liable for injuries inflicted on another by a contractor in carrying out negligent plans prescribed or assented to as a part of the contract. Otherwise expressed, he is answerable for injuries during the progress of the work, caused by defective construction which is inherent in the original plan devised by the employer: *Brannock v. Elmore*, 114 Mo. 55, 65; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227; *Daegling v. Gilmore*, 49 Ill. 248. Thus, if one employs a reputable machinist to construct a steam-engine, and it blows up from bad materials or unskillful work, the contractee is not answerable for an injury thus occasioned to his own servant or to a third person, though it would be otherwise if the machine were made according to the contractee's own plan, or he interfered and gave directions as to its manner of construction: *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

A Contractee is Answerable for a Violation of His General Duty to the Public or to Third Persons.—If a party is under a duty to the

public to see that work he is about to have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid liability in case the work is negligently done to the injury of another: See principal case; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136; *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608; *Pickard v. Smith*, 10 Com. B., N. S., 470, 480; *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39; *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274; *Cabot v. Kingman*, 166 Mass. 403, 406; *Colgrove v. Smith*, 102 Cal. 220; *Spence v. Schultz*, 103 Cal. 208; *Norton v. St. Louis*, 97 Mo. 537; *Barrow etc. Co. v. Kane*, 88 Fed. Rep. 197; *Barkman v. Pennsylvania R. R. Co.*, 89 Fed. Rep. 453. Compare *Chicago etc. Gas Co. v. Myers*, 168 Ill. 139. So, if work is being done by contract, the contractee is liable for injury arising from the violation of his duty to third persons in the performance of the work: *City etc. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345; and see liability for negligence in withdrawing lateral support, *Infra*.

To illustrate, a carrier's obligation to transport his passengers safely cannot be shifted from himself by delegating it to an independent contractor: *Barrow etc. Co. v. Kane*, 88 Fed. Rep. 197; *Barkman v. Pennsylvania R. R. Co.*, 89 Fed. Rep. 453. The duty of complying with a city ordinance regulating the making and maintaining of an excavation in a sidewalk cannot be shifted to an independent contractor: *Spence v. Schultz*, 103 Cal. 208; and an owner authorized to maintain scuttle holes in a sidewalk for the reception of coal cannot relieve himself of the duty to keep them in a safe condition by delegating it to an independent contractor. Notwithstanding such delegation of duty, the owner is liable for an injury resulting from an unsafe condition of such holes: *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274; *Pickard v. Smith*, 10 Com. B., N. S., 470, 480. In *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699, a contractor, in doing work, opened a coal hole in a sidewalk, and left it open a few minutes after the work was finished, but it was held that the owner was not liable for injuries to a boy who fell into the hole during that time and was injured, as a reasonable time had not elapsed in which to discover the dangerous condition of the sidewalk: Compare *Benjamin v. Metropolitan Street Ry. Co.*, 133 Mo. 274. It is the duty of a property owner who maintains a coal hole in a city sidewalk in front of his premises to exercise reasonable care and diligence in keeping it safe and secure; and if a blacksmith is employed by a property owner to secure the cover over a coal hole, which the latter maintains in a sidewalk in front of his premises, the former, being subject to the direction and control of his employer, and liable to be dismissed at any stage of the work, is not to be regarded as an independent contractor, for whose negligence the property owner would not be liable: *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533.

A property owner who creates a danger to others should be held bound to provide against it, and not be allowed to abandon this duty to a contractor or his servants. If he does so, it is at his peril. Hence if, in constructing a building, he makes an excavation in the adjacent sidewalk for coal vaults and an area to be used in connection with the building, he is answerable for injuries caused by the neglect of independent contractors in keeping the excavation covered or guarded: *Hawver v. Whalen*, 49 Ohio St. 69. That a lot owner is answerable for injuries caused to a traveler by contractors leaving the excavation for a building insufficiently guarded, see *Homan v. Stanley*, 66 Pa. St. 464, 5 Am. Rep. 389. So, where they leave uncovered an excavation in the street made there by the owner without authority, it being his duty to keep the street as safe as before the excavation was made: *Congre v. Smith*, 18 N. Y. 79; and see *Nolan v. King*, 97 N. Y. 565, 49 Am. Rep. 561. The defendant employed a contractor to build a drain from the cellar of its building to the common sewer. It was necessary to cut through a plank barrier which had been constructed beneath the surface of the street to prevent the tide from flowing into cellars in that locality. The contractor so negligently performed this part of the work that the tide water flowed through the opening made by him into the cellar of a building owned by the plaintiff, adjoining that of the defendant. The defendant, having failed in his duty to make the barrier tight after laying the drain, was held answerable for the injury done by the tide-water to the plaintiff's premises: *Sturges v. Theological etc. Soc.*, 130 Mass. 414, 39 Am. Rep. 463. The duty of a person who hangs a lamp over a highway, so as to become dangerous, if it is not in good repair, is to keep it in repair, and, if injury happens to a traveler on the highway by reason of the failure of such person to perform his duty respecting the lamp, he must respond therefor in damages: *Tarry v. Ashton*, 1 Q. B. Div. 314.

When a contractee undertakes to provide any of the instrumentalities for contract work, he owes the contractor and his servants the duty of care in respect to those matters over which he retains control, and those duties which he undertakes to perform: *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333. If a contractee agrees to furnish the contractor with material, machinery, or appliances for his work, and injury ensues to a servant of the contractor by reason of a failure to provide safe instrumentalities, the contractee is answerable: *McCall v. Pacific etc. S. S. Co.*, 123 Cal. 42. When an owner furnishes machinery to a contractor while work is being done upon his premises, and injury results through his fault in not keeping it in suitable and safe condition, he is liable to any servant of the contractor for an injury resulting to him from defects therein, and his liability arises out of his obligation to provide safe appliances for the contractor to use, and to keep his premises in safe condition, independent of any contract provision to that effect. Thus, an owner who furnishes

a stationary engine on his premises, and the appliances connected therewith, for hoisting coal, to a contractor, is bound to keep the machinery and premises in safe condition, and is liable for an injury to the contractor's servant resulting from a defect in the machinery of which he knew, or by inspection might have known: *Johnson v. Spear*, 76 Mich. 139, 15 Am. St. Rep. 298. Under a contract between a railway company and a stone quarry owner, by which the former is to furnish the latter with cars on his own sidetrack, the former is bound to furnish cars which are reasonably safe for the use of the quarry owner and his servants; but the company is not liable to such servant not a party to the contract, and over whom it has no control, for injuries received on the sidetrack, and resulting from its breach of contract with the quarry owner in furnishing him with a car having defective brakes, where the plaintiff was guilty of contributory negligence: *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 251, 24 Am. St. Rep. 333, 342. But if a contractee has discharged his duty in furnishing hoisting apparatus in a reasonably safe condition, he cannot be held answerable for injuries to an employé of the contractor, resulting from the improper management of the apparatus by the fellow-servants of such employé: *Piette v. Bavarian Brewing Co.*, 91 Mich. 605, 609.

One who invites another expressly or by implication to come upon his premises must use ordinary care and prudence to render the premises reasonably safe for the visit: *Richmond etc. Ry. Co. v. Moore*, 94 Va. 493, 504. But there is nothing in the nature of real property which requires that its owner should be held to a stricter liability than the owner of personal property, and he is not, therefore, answerable for the negligence of persons employed upon his land any further than he would be if they were employed about his chattels: *Hughes v. Railway Co.*, 39 Ohio St. 461, 475; *Robinson v. Webb*, 11 Bush, 464, 474; *King v. New York Cent. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. One who employs an independent contractor to make and conduct an exhibition is not relieved from responsibility to persons receiving injury, if the exhibition is of a kind which will probably cause injury to spectators, unless due precautions are taken to guard against harm. For example, a street railway corporation which maintains a place on the line of its road for exhibitions, advertising them on its cars and admitting its patrons free, and employing a manager to furnish and maintain exhibitions and entertainments, is answerable to a spectator receiving injury while attending an exhibition, if it is in its nature such that it will necessarily or probably cause injury to persons present unless guarded against, and the railway corporation fails to exercise due care to prevent harm: *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323. So, a street railway company which advertises a balloon ascension at a park owned by it must respond in damages to a visitor who is hurt by a pole, used in making the ascension, falling upon him, where its fall was the result

of negligence; and it makes no difference whether the aeronaut was an independent contractor or not, or how the visitor went to the park, whether on the street-cars or by some other mode of conveyance, as the gist of the action is the company's negligent failure to use proper care in protecting the visitor from danger while present at the company's invitation: *Richmond etc. Ry. Co. v. Moore*, 94 Va. 493. And where the plaintiff sued a defendant land owner for injuries received by falling into a trench in the yard, the land owner's defense that the trench and yard were in the control of an independent contractor, who was laying drain pipes therein for the defendant, was held of no avail, as it was the owner's duty to use care in protecting persons who came upon his premises at his invitation: *Curtis v. Kiley*, 153 Mass. 123. But in *Smith v. Benick*, 87 Md. 610, a somewhat different view is taken. It is there held that if a competent aeronaut, acting as an independent contractor, is employed by the proprietor of a pleasure resort to make a balloon ascension, the method of which is not, of itself, likely to cause danger, but during which a third person is injured by a pole which is negligently allowed to fall by servants of the aeronaut, the proprietor is not answerable for the injury, where the aeronaut supplies his own servants and uses his own discretion. The dissenting opinion, however, of Bryan, J., in this case, pointing out the duty of the proprietor of the grounds, in such a case, to make provision for the safety of those assembled, by enlarging the inclosure, so that the pole would fall within it, is entitled to consideration.

A city owes a duty to the public to keep its streets and sidewalks in reasonably safe condition for travelers thereon, and it cannot delegate this duty: *Norton v. St. Louis*, 97 Mo. 537; and persons who stand in a contract relation to the public, represented by city authorities, to dig trenches and lay pipes in the streets in a manner required by an ordinance of the city, cannot delegate the duty imposed upon them by contracting with another to do the work, which cannot be performed without danger to the public: *Colgrove v. Smith*, 102 Cal. 220, 224. "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it": *Cabot v. Kingman*, 166 Mass. 403, 406.

A Contractee is Answerable for the Violation of a Duty Imposed by Contract or by Statute.—If a contractee violates a duty imposed by express contract upon himself, he cannot evade liability by employing another to do that which he agreed to perform: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. For instance, where a company undertook to lay water pipes in a city,

agreeing with the city that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employés on the premises," and the company let out the work to a contractor who used a steam-drill in such a manner as to frighten a traveler's horse and injure the traveler, it was held by the supreme court of the United States that the company was liable: *Water Co. v. Ware*, 16 Wall. 566.

The person upon whom a statutory obligation is imposed is liable for any injury which arises to others from its nonperformance, or in consequence of its having been negligently performed, either by himself or by a contractor employed by him: *Atlanta etc. R. R. Co., v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Gray v. Pullen*, 5 Best & S. 970; *Hole v. Sittingbourne etc. Ry. Co.*, 6 Hurl. & N. 488; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Houston etc. R. R. Co. v. Meador*, 50 Tex. 77; *Eyler v. County Commrs.*, 49 Md. 257, 33 Am. Rep. 249. So the nonperformance of a duty imposed by an ordinance requiring builders to construct a covered way next to a building, which is being erected adjacent to a sidewalk in a city, cannot be excused by the plea of an independent contract whereby another agrees to perform the duty: *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912. So where a municipal ordinance requires the owner of materials forming an obstruction in a street to prepare and place lights thereon with such care and diligence as reasonably to secure their burning till daylight, such owner is liable to third persons for injuries incurred through negligence in the performance of this duty either by himself or by a contractor in his employ, and even if the lights were extinguished by an unknown cause: *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269.

A Contractee Is Answerable Where He Has Accepted the Work or Ratified the Acts of an Independent Contractor: *First Presbyterian Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Fanjoy v. Seales*, 29 Cal. 244; *Tyler v. Tehama Co.*, 109 Cal. 618; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. Thus, owners assume the responsibility of the sufficiency of a structure by an acceptance and use of it, and the liability of the contractors to third persons then ceases: *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. An owner, even before he accepts the work after its completion, is liable if he uses it and injury results therefrom: *Read v. East Providence Fire Dist.*, 20 R. I. 574. The owner of a building erected by a contractor is, after his acceptance thereof, answerable for injuries to third persons caused by its defective construction, though he would not be liable for injuries afterward sustained by a painter, caused by the fall of a cornice on account of a staging being suspended thereto: *Fanjoy v. Seales*, 29 Cal. 243. If an employer, at the time of assuming possession of work from an independent contractor, knew, or ought to have known, or from a care-

ful examination could have known, that there was any defect in the work, he must respond for any injury caused to a third person by defective construction; and if an accident happens or injury is sustained after work done by an independent contractor has been accepted by the employer and he has resumed possession, no recovery can be had by a third party against the contractor for negligence in the construction of the work: *First Presbyterian Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808. The manufacturer of a steam boiler is answerable only to his employer for any want of care or skill in the construction thereof. After the boiler has been completed and accepted by the contractee, who has the exclusive ownership, management, and conduct of it, the manufacturer is not liable for injuries done to a third person by an explosion occurring in consequence of the defective construction of the boiler: *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638. So, if a contractor so performs his work that it becomes a nuisance, the contractee, if he accepts the work in that condition, is liable for consequent and subsequent injury to others: *Vogel v. Mayor*, 92 N. Y. 10, 44 Am. Rep. 349; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. An employer is liable when he has ratified or adopted the unauthorized acts and wrongs of an independent contractor: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Harrison v. Kiser*, 79 Ga. 588. But a contractee is not answerable for injuries occasioned by the negligence of an independent contractor, unless he accepts work which he knew, or ought to have known, was so negligently done as to be unsafe and dangerous: *Chartiers etc. Gas Co. v. Lynch*, 118 Pa. St. 362.

Liability for Negligence in Cases Where Corporations Are Concerned. The law makes no distinction between natural persons and corporations with respect to the liability of a contractee for the negligence or other torts of an independent contractor: *Hughes v. Railway Co.*, 39 Ohio St. 461, 477; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85, 56 Am. Dec. 494; *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608; and see the next succeeding subdivision concerning railway companies. If a company employs one whom it has no right to control as to the manner in which the work is to be done, such person is an independent contractor: *Wallace v. Southern etc. Oil Co.*, 91 Tex. 18; and the company is not answerable for injuries to third persons caused by his negligence: *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608. A private corporation for profit cannot avail itself of the rule that, in actions for negligence, a municipal corporation may, in certain cases, cast the responsibility upon an independent contractor whose negligence caused the injury: *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608; and a corporation is not relieved from its primary liability for damages occasioned to individuals by the exercise of its chartered rights by contractors employed by the corporation merely because the contractors may, under their contract,

be liable over to the corporation for such damages: *Lesh v. Wabash Nav. Co.*, 14 Ill. 85, 56 Am. Dec. 494.

Liability for Negligence in Performing Railroad Work.—It was held in *Stone v. Cheshire R. R. Corp.*, 19 N. H. 427, 51 Am. Dec. 192, that where a railroad corporation contracted with other parties to build a part of its road, and while they were blasting rocks, a fragment struck the plaintiff, injuring him, the corporation was liable for the injury; but this doctrine of making a contractee answerable for the negligence of an independent contractor was overruled in *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12. A railroad company cannot delegate to a contractor its chartered rights and privileges so as to exempt itself from liability; but a railroad company may employ an independent contractor to construct its road, and a contract of this character is not such a delegation of its chartered rights as will render the company liable for the unauthorized wrongs of the contractor or his servants while engaged in the work: *Sanford v. Pawtucket St. Ry. Co.*, 19 R. I. 537, 541; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Cunningham v. International R. R. Co.*, 51 Tex. 503, 32 Am. Rep. 632; *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545. It is, therefore, a general rule that a railway company, which employs an independent contractor to do construction, improvement, or other lawful work, the probable effect of which will not be injurious to another, is not answerable for the negligence or tort of the contractor, or of the latter's employés, which results in injury to third persons: *St. Louis etc. Ry. Co. v. Yonley*, 53 Ark. 503; *Scarborough v. Alabama etc. Ry. Co.*, 94 Ala. 497; *Membery v. Great Western Ry. Co.*, 14 App. Cas. 179; *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545; *Clark v. Hannibal etc. R. R. Co.*, 36 Mo. 202; *Tibbetts v. Knox etc. R. R. Co.*, 62 Me. 437; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Cunningham v. International R. R. Co.*, 51 Tex. 503, 32 Am. Rep. 632; *Leavitt v. Bangor etc. R. R. Co.*, 89 Me. 509; *Hanna v. Railway Co.*, 88 Tenn. 310; *Clark v. Vermont etc. R. R. Co.*, 28 Vt. 103; *Steel v. Southeastern Ry. Co.*, 16 Com. B. 550; *Rome etc. R. R. Co. v. Chasteen*, 88 Ala. 591; *Hughes v. Railway Co.*, 39 Ohio St. 461; *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925; particularly where the contractor has direction and control of the work: *Hitts v. Republican Valley R. R. Co.*, 19 Neb. 620; *Scarborough v. Alabama etc. Ry. Co.*, 94 Ala. 497, 499; *Leavitt v. Bangor etc. R. R. Co.*, 89 Me. 509; *Thomas v. Altoona etc. R. R. Co.*, 191 Pa. St. 361; *Meyer v. Midland Pac. R. R. Co.*, 2 Neb. 319, 342; *Miller v. Minnesota etc. Ry. Co.*, 76 Iowa, 655, 14 Am. St. Rep. 258; *Rome etc. R. R. Co. v. Chasteen*, 88 Ala. 591, 593; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *St. Louis etc. R. R. Co. v. Willis*, 38 Kan. 330; *Fulton County etc. R. R. Co. v. McConnell*, 87 Ga. 756; *Brunswick etc. Co. v. Brunswick etc. R. R. Co.*, 106 Ga. 270, 71 Am. St. Rep. 249; *Hughes v. Railway Co.*, 39 Ohio St. 461; *Edmundson v. Pittsburgh etc. R. R. Co.*, 111

Pa. St. 316; *Sanford v. Pawtucket etc. Ry. Co.*, 19 R. I. 537; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. Neither is railroad company liable for the negligence or other tort of an employé of a subcontractor under a contractor employed by the company to do a specified work, where the company is not in control thereof: *Pawlet v. Rutland etc. R. R. Co.*, 28 Vt. 297; *Callahan v. Burlington etc. R. R. Co.*, 23 Iowa, 562; *Eaton v. European etc. Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Alabama etc. Ry. Co. v. Martin*, 100 Ala. 511; *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; as where, through the negligence of men employed by a subcontractor in performing the work of constructing a road, stones and rocks are thrown by a blast upon the plaintiff's adjoining property, injuring it: *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267.

A reservation of the right on the part of a railroad company to direct as to the quantity of work to be done, or its condition when completed, does not amount to a general control over the mode and manner of doing the work, so as to make the company liable for the negligence of independent contractors or subcontractors, and their agents or servants, within the rule that a contractee is answerable for the acts of an independent contractor where the former retains direction and control of the work: *Hughes v. Railway Co.*, 39 Ohio St. 461. Neither does the fact that the work is to be done subject to the approval of the contractee make the latter liable for the negligence of a contractor or a subcontractor: *Alabama etc. Ry. Co. v. Martin*, 100 Ala. 511. The fact that a general railway contractor sublets a part of the work embraced in his own contract, and that the work is to be done in a thorough and workmanlike manner, to the satisfaction of his chief engineer, is not evidence of such an assumption of a right to control, as to the details or methods of doing the work, as will make him answerable for the wrongs of such subcontractor or of his servants. Nor does the fact that the contract provides that the track is to be laid as far as such engineer shall order take it out of the rules applicable to independent contractors: *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925. Compare *Leavitt v. Bangor etc. R. R. Co.*, 89 Me. 509, showing that an act done by the railway company, in placing cars to enable the contractor to conveniently do his work, does not make the company liable for the acts of the contractor. The company is not answerable for injury resulting to a third person from a contractor's negligent manner of doing the work, though it employs its own surveyor to superintend it, and to direct what shall be done: *Steel v. Southeastern Ry. Co.*, 16 Com. B. 550; or reserves the power of dismissing any of the contractor's workmen for incompetency: *Reedie v. London etc. Ry. Co.*, 4 Ex. 244. Nor is a street railway company liable for personal injuries caused by the negligence of an em-

ployé of the contractor, employed to construct its road, where the company reserves no other control over the work than to approve or disapprove it, when completed: *Thomas v. Altoona etc. Ry. Co.*, 191 Pa. St. 361.

A railway company is not liable for damages resulting from negligence in the management of one of its trains, while being used and governed by contractors in the construction of a portion of its road under a contract with the company: *Cunningham v. International R. R. Co.*, 51 Tex. 503, 32 Am. Rep. 632. If it contracts with a third person for the construction of its road, in such a manner that the contractor has the right to direct the details of construction, and to control the mode in which the work shall be done, and the agencies employed, reserving only the right to insist that the result shall be in compliance with the terms of the contract, it is not liable for injury caused by the negligence of the contractor, or of his employés: *Rome etc. R. R. Co. v. Chasteen*, 88 Ala. 591, 593. If the company lawfully employs an independent contractor to construct its road, retaining no control over him or the work, he is not the agent or servant of the company, and it is presumed that he will do the work in a lawful manner. If he does it illegally, he, and not the company, is liable therefor: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. If an employé of a railroad company, which is a warehouseman, is also an independent contractor, exercising, as to some things, an independent business, and is not subject to the immediate direction and control of the company, as to his independent employment, the company is not liable to the owner of goods stored in its warehouse, where they are destroyed by fire through the negligence of such contractor: *Brunswick etc. Co. v. Brunswick etc. R. R. Co.*, 106 Ga. 270, 71 Am. St. Rep. 249. And it has been held in Rhode Island, where a street railway company contracts with an independent contractor, over whom it has no control, for the construction of its road, and the contractor or his workmen are guilty of negligence in erecting and maintaining a rope or wire across a highway in the course of the work of construction, that the company is not liable for an injury sustained by a traveler on the highway by reason of such obstruction: *Sanford v. Pawtucket St. Ry. Co.*, 19 R. I. 537. If a railroad company engages a person who owns a steam-engine to pump water out of the way of an excavation, near a highway, which is being made by the company, and such owner has full control of the engine, the company is not answerable for injuries to a traveler on the highway, caused by the negligence of the owner in operating the engine so near the highway as to frighten the traveler's horse and to overturn his carriage, for it is not necessarily a nuisance to operate a portable steam-engine, in a careful manner, in close proximity to a public highway: *Wabash etc. Ry. Co. v. Farver*, 111 Ind. 195, 40 Am. Rep. 696. See, also, *Bailey v. Troy etc. R. R. Co.*, 57 Vt.

252, 52 Am. Rep. 129. So where an independent contractor is in possession of an incomplete railway embankment, being constructed in building the company's road, the company is not answerable for the drowning of a boy in a pool of water formed by the embankment: *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59. And, if a railroad company employs an independent contractor to substitute a new railroad bridge for an old one without interruption of traffic, the company is not liable for the negligence of the contractor, where it retains no control or direction over the manner of executing the work. It is the custom of railroads to let such contracts to independent contractors, and the company, in such a case, should not be held accountable for a faulty construction of the bridge, where it has endeavored to secure a reliable contractor, and has, by its contract, guarded, as far as possible, against the dangers incident to the work, which is not, of itself, essentially hazardous: *Norfolk etc. Ry. Co. v. Stevens*, 97 Va. 631; *Bibb v. Norfolk etc. R. R. Co.*, 87 Va. 711.

There are, however, exceptions to the general rule that a railway company is not answerable for the negligence and other torts of independent contractors. Thus, if the work is of such a character that its probable effect will be to injure another, it cannot escape liability for its negligence by delegating the work to an independent contractor: *St. Louis etc. Ry. Co. v. Yonley*, 53 Ark. 503; *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323. The law sometimes requires "an employer, at his peril, to see that due care is used to prevent harm, whatever the nature of the contract with those whom he employs": *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427; but where a railroad company is under no obligation to protect third persons against the negligence of a contractor or of his employés engaged in dangerous work, of which the company has no control, the company is not answerable for resulting injuries. Thus, it is not answerable to the servant of a contractor engaged in shunting cars, though the operation of shunting cars without assistance is dangerous to any man performing it, where the employé had, for several years, shunted trucks on the company's line, sometimes with and sometimes without assistance, but was injured at a time when he had no assistance, and where the company was under no duty to furnish assistance: *Membery v. Great Western Ry. Co.*, 14 App. Cas. 179. So, where a railway company contracted with certain persons to construct its road and appurtenances, and such contractors, through their superintendent, hired the plaintiff to work upon a freight-house they were building for the company, it was held that the company was not answerable for an injury to the plaintiff caused by handling timber to which a poisonous mixture, in which corrosive sublimate was an ingredient, had been applied to prevent its decay, and by breathing the exhalations of the substance; that the contractors were not the servants of the

company; and that they alone were answerable: *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545. And in *Tibbetts v. Knox etc. R. R. Co.*, 62 Me. 437, it was held that a railroad company cannot be made to respond in damages for injuries caused to buildings, in the vicinity of its road, by blasting done by subcontractors, in constructing a section of the road.

A railroad company is liable for injuries to third persons occasioned by the negligence of independent contractors, where the company has failed to perform a duty which it owes to third persons or to the public, as in keeping its premises safe: *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323. Thus, if a city railroad company is engaged in laying a track in a public street, and negligently leaves rails projecting beyond a temporary barrier inclosing the place where the track is being laid, it is liable in damages to one who, traveling at night, and exercising due care, is injured by coming in contact with such projecting rails, notwithstanding the fact that the injury was sustained at other than a regular street crossing, and that the work was being done by an independent contractor: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427. And, if an electric railroad company employs a contractor to dig for it a certain number of post holes in a public street, and nothing but the size of the holes is fixed by the contract, the company must respond in damages for an injury to one who falls into one of the holes, which was finished several days before the accident: *Donovan v. Oakland etc. Transit Co.*, 102 Cal. 245, 247.

It is the duty of a railroad company to keep its track safe, and it cannot escape liability for the nonperformance of this duty by placing its road in the hands of contractors. Thus, where it is the duty of a railroad company to fence its track, the fact that the road is still under the control of contractors does not change the liability of the company in that regard: *Rockford etc. R. R. Co. v. Heflin*, 65 Ill. 366. Compare *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722. Nor can the company, by any stipulations with contractors, relieve itself from its obligation to protect the public from danger, when it interferes with, or obstructs a public highway: *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; as where the contractors are negligent in making a crossing: *Taylor etc. Ry. Co. v. Warner*, 88 Tex. 642. If contractors do only what they are authorized to do, by a railway company, and the act is unlawful, the company must be held to have assented to it, and, where parties are injured in consequence of such act, the company must be held liable as a joint wrongdoer: *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399.

A railroad company is, of course, liable for the negligence of contractors, or of those in their employment, where it retains control of the work, if injury results to third persons, for, in such a case, the relation of independent contractors does not exist: *Hughes*

v. Railway Co., 39 Ohio St. 461; Railroad Co. v. Hanning, 15 Wall. 649; Burton v. Galveston etc. Ry. Co., 61 Tex. 526. A reservation of control over a contractor as to particular acts does not make the contractee liable as a master concerning the whole work, but it does so with respect to acts as to which such control is reserved: Dublin v. Taylor etc. Ry. Co., 92 Tex. 535; Burton v. Galveston etc. Ry. Co., 61 Tex. 526. If contractors are common laborers, the company which employs them is answerable for their negligence whereby injury results to third persons: St. Johns etc. R. R. Co. v. Shalley, 33 Fla. 397; Texas etc. Ry. Co. v. Juneman, 71 Fed. Rep. 939. Compare Fairchild v. New Orleans etc. R. R. Co., 60 Miss. 931, 45 Am. Rep. 427. A contractor exercising a chartered privilege of the company is a servant only, for whose abuse of the privilege the company must answer: West v. St. Louis etc. R. R. Co., 63 Ill. 545. A railway company let certain work to a contractor, furnishing him a construction train with an engineer to run it. Except in respect to speed and sidetracking for other trains, the train was under the control of the contractor. The company was bound to discharge the engineer on the contractor's complaint; otherwise, the company controlled him, and it paid his wages, but deducted them from the amount due the contractor. It was held that the engineer was the servant of the company: New Orleans etc. R. R. Co. v. Norwood, 62 Miss. 565, 52 Am. Rep. 191. See, also, New Orleans etc. R. R. Co. v. Reese, 61 Miss. 581; and compare Rogers v. Florence R. R. Co., 31 S. C. 378, showing that a person engaged by a railroad company to grade its road-bed, who is to do the whole work himself, or by servants and agents employed by himself at a stipulated compensation, is an independent contractor, and not an employ   of the company. A railway company is answerable for the negligence of contractors in making a crossing over a public highway, whether the contractors are under its control or not. It cannot devolve upon another a duty imposed upon it by law, so as to exempt itself from liability in case of a failure to perform that duty: Taylor etc. Ry. Co. v. Warner, 88 Tex. 642, 648.

There are some cases which hold that a railway company is answerable for the trespasses of hands employed by its contractors while engaged in the construction of its road: Cairo etc. R. R. Co. v. Woosley, 85 Ill. 370; Rockford etc. R. R. Co. v. Wells, 66 Ill. 321; Chicago etc. R. R. Co. v. Whipple, 22 Ill. 105; Stone v. Cheshire R. R. Corp., 19 N. H. 427, 51 Am. Dec. 192. But these cases appear to proceed upon the principle that contractors for constructing a railroad are the servants of the company authorized to construct it, and that the tortious acts of the contractors, while about the business of the company are, therefore, properly chargeable to it: See Chicago etc. R. R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Stone v. Cheshire R. R. Corp., 19 N. H. 427, 51 Am. Dec. 192. In other cases, another view is taken, and one which is more

in consonance with the general law governing the liability of a contractee for the acts of independent contractors. Thus, in *Clark v. Hannibal etc. R. R. Co.*, 36 Mo. 202, and *Railway Co. v. Knott*, 54 Ark. 424, it is held that a railroad company is not answerable for injuries occasioned by the trespass of the contractor's servants or laborers engaged in building the road, and in *New Orleans etc. R. R. Co. v. Reese*, 61 Miss. 581, it is held that the company is not answerable for the wrongful act of a contractor in taking trees from another's land in procuring material to be furnished under his contract, unless he was, at the time, acting as an agent or employé of the company, in which event it would be answerable. So it has been held that a railroad company is not answerable for trespasses committed by a subcontractor, on adjacent lands, in building the road, as where he goes outside of the right of way to obtain earth for making an embankment: *Alabama etc. Ry. Co. v. Martin*, 100 Ala. 511; *Waltemeyer v. Wisconsin etc. Ry. Co.*, 71 Iowa, 626; *Eaton v. European etc. Ry. Co.*, 59 Me. 526, 8 Am. Rep. 430.

Liability for Negligence in Performing Work for Cities.—It has been held that a municipal corporation is not liable for damages occasioned by the negligence of independent contractors or their servants: *Barry v. St. Louis*, 17 Mo. 121; *Borough v. Simmons*, 112 Pa. St. 384, 56 Am. Rep. 317; *Painter v. Mayor*, 46 Pa. St. 213; *Jansen v. Jersey City*, 61 N. J. L. 243; *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87; *Kelly v. New York*, 11 N. Y. 432; *Pack v. New York*, 8 N. Y. 222; *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Heidenwag v. Philadelphia*, 168 Pa. St. 72; and compare *Murphy v. Lowell*, 128 Mass. 396, 35 Am. Rep. 381; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 35; particularly where the contractor has control of the work and not the city: *Mahoney v. Boston*, 171 Mass. 427; *Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642; *Harper v. Milwaukee*, 30 Wis. 365; *Charlock v. Freel*, 125 N. Y. 357; *Saunders v. Toronto*, 26 Ont. App. 265; *Seymour v. Cummins*, 119 Ind. 148; and in California, a city is not answerable for an injury caused by an unguarded excavation made by a contractor, where there is no statutory provision imposing a liability: *Arnold v. San Jose*, 81 Cal. 618; nor is it liable for the negligence of a street contractor where the contract was let to the lowest bidder as required by law: *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526.

The better view, however, is that it is the duty of a city or town to keep its streets and sidewalks in a safe condition for public travel, and that this duty cannot be so delegated to another as to relieve the city or town of its obligation. Hence, it is settled, in many of the states, that a city or town charged with the duty of keeping its streets and sidewalks in repair is answerable for an injury caused by a dangerous obstruction, defect, or excavation therein made and negligently left by an independent contractor,

without proper lights, guards, or covering: *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136; *Springfield v. Le Claire*, 49 Ill. 476, 479; *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432; *Beatrice v. Reid*, 41 Neb. 214; *Lloyd v. Mayor*, 5 N. Y. 369, 55 Am. Dec. 347; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Storrs v. Utica*, 17 N. Y. 437, 72 Am. Dec. 437; *Brusso v. Buffalo*, 90 N. Y. 679; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243; notes to *Goddard v. Harpswell*, 30 Am. St. Rep. 412; *Farquar v. Roseburg*, 17 Am. St. Rep. 736; *Phillips v. Veazie*, 40 Me. 96; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; *Brooks v. Somerville*, 106 Mass. 271; *Blake v. St. Louis*, 40 Mo. 569; *Mayor v. McCary*, 84 Ala. 469; *Chicago v. Joney*, 60 Ill. 383; *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753, and note thereto on the liability of a city as affected by the employment of a contractor: *Nashville v. Brown*, 9 Heisk. 1, 24 Am. Rep. 289; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; although it has no immediate control of the contractor or his work: *Circleville v. Neuding*, 41 Ohio St. 465, 469; *Fink v. St. Louis*, 71 Mo. 52; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136; note to *Goddard v. Harpswell*, 30 Am. St. Rep. 412; and has, in fact, contracted against such liability, by imposing upon the contractor the duty of taking precautions to avoid danger: *McAllister v. Albany*, 18 Or. 426; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780. The city is, of course, liable for the negligence of contractors where it retains control of them or of the work: *Brown v. Seattle*, 16 Wash. 462, 58 Am. St. Rep. 46; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431; *Harper v. Milwaukee*, 30 Wis. 365, 375; for the persons who contract to do the work under such circumstances are not independent contractors: *Brown v. Seattle*, 16 Wash. 462, 58 Am. St. Rep. 46. But in a comparatively late New York case the doctrine is announced that, to make a city liable for the negligence of those who have contracted to do work for the city, it must have the power to direct and control the manner of performing the very work in which the negligence occurs: *Charlock v. Freel*, 125 N. Y. 357.

A city is not absolved from its duty of keeping its streets in a safe condition because it has employed a contractor to do work thereon and the streets become unsafe through his neglect, nor because it has not accepted his work: *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453; and the fact that it is the duty of a contractor, doing work on public streets, to maintain warning lights at an excavation he has made, does not relieve the municipality from liability for an accident resulting from the negligent omis-

sion to maintain such lights: *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442. A city employed an undivided upon contract to repair one of its streets. The contractor's servants stretched a rope across the street and hung a lighted lantern upon the rope at night. The lantern was broken and extinguished by boys. The plaintiff, in driving a hack at night, came in contact with the rope and was injured. The city authorities and the contractor had no notice of the rope. It was held that the plaintiff could recover against the city: *Mayor v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395. Compare *Klatt v. Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759, holding that no action will lie against a city where a person is injured by reason of a stranger's removal of a barrier erected by a contractor near street repairs. A city is liable for damages caused in grading a street whereby lands abutting thereon are deprived of lateral support: *Smith v. Seattle*, 20 Wash. 613, 617; *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839. A city cannot surrender its control over its streets so as to relieve itself from liability for their unsafe condition: *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432; and where it causes work to be done which is dangerous to the public, it must take notice of the character of the work, and the condition in which it is left, whether safe or dangerous: *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136. So if a city adopts a defective plan for drainage, and lets the work to a contractor, who constructs the work according to the plan, but special injury results to a property owner by reason of negligence in devising the plan, the city must respond therefor: *Seymour v. Cummins*, 119 Ind. 148. When, acting within its general powers, a city makes a contract for the grading of a street, in which it is provided that the contractors, in consideration of doing the work, are to receive and appropriate to their own use all the stone in that part of the street, and in pursuance of the contract they proceed to take out and dispose of the stone, they are the agents of the city in the premises, and the city is answerable for their acts: *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861. If injury is caused to a third person by contractors' negligent blasting in a street, the city must respond therefor, where the injured party is not at fault: *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; and it has been held that the city is answerable, though the contractor used due care in the blasting, on the ground that the work is intrinsically dangerous: *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; but in *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348, it is held that a city is not answerable for the act or neglect of contractors who are constructing a sewer in one of its streets, and who, while engaged in the prosecution of their work, fire off a blast, whereby the plaintiff's horses, then on an adjacent street in perfect repair, are frightened, and the plaintiff, while attempting to control them, suffers serious injuries. That there is no difference in the degree of a city's liability for

the negligence of an independent contractor, whether the work is constructed under a special privilege or in the performance of a public and governmental duty: See *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 530.

A city is not liable for the negligence of an independent contractor in matters collateral to the execution of the work: *Kuehn v. Milwaukee*, 92 Wis. 263; *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225. It is answerable for such dangers as are incident to, and consequent upon, the nature of the work itself; but as to those dangers that result from an improper execution of it, its liability may be limited by the terms of the contract under which the work is performed: *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753. Thus, if one contracts with a city to dump garbage into a lake, the city is not liable for injuries to fishing nets resulting from the garbage being dumped and carried into the nets by the ordinary movements of the water: *Kuehn v. Milwaukee*, 92 Wis. 263. So if a city has a contract with a person to furnish it with lumber to be delivered in the city, and he delivers it and piles the lumber, his act in so doing is not the act of the city, and it is not liable for his negligence unless it has notice thereof, express or implied: *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 219. If a city adopts a proper plan of drainage and lets the work by contract, and the contractor is authorized to use his own methods and means for the construction of the drain, the city is not answerable for his negligence: *Seymour v. Cummins*, 119 Ind. 148; but if a municipality, acting as a private proprietor of lands, plans and authorizes the construction of a levee within the natural bed of a watercourse, and a contractor or other person constructs and maintains such levee, he, as well as the municipality, is answerable for the injuries resulting therefrom. An action may be maintained against either or both if the work was inherently and according to his plan and location a dangerous obstruction, such as ordinary prudence should have guarded against: *De Baker v. Southern etc. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237.

Liability for Negligence in Allowing Fire to Spread.—It has been held that a contractee is answerable in damages for injuries to a third person, caused by the act of a contractor in negligently and improperly lighting a fire on the contractee's lands and permitting it to spread to the land of such third person: *Black v. Christchurch etc. Co.*, [1894] App. Cas. 48. Compare *Whitson v. Ames*, 68 Minn. 23. The weight of authority, however, is to the effect that the owner of land is not liable for injury caused by the communication of a fire negligently set on his land by one contracting to clear it: *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12; *Shute v. Princeton Township*, 58 Minn. 337. So where the fire is set out by an employé of a subcontractor: *Callahan v. Burlington etc. R. Co.*, 23 Iowa, 562. Compare *Kellogg v. Payne*, 21 Iowa, 575.

If a contract is made with a town, through its supervisors, for the repair of a highway and the burning of brush cut and piled thereon, the town is not answerable for injuries caused by the negligence of the contractor in allowing the fire to spread: *Shute v. Princeton Township*, 58 Minn. 337.

Liability for Negligence in Blasting.—In the event of an injury caused to a third person by negligent blasting performed by a contractor or subcontractor on the premises of the contractee, the courts are not uniform in stating the ground of liability or nonliability. In *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17, such work is considered to be “intrinsically” dangerous, and the contractee liable on that ground. The operation of blasting with dynamite has also been called “intrinsically” dangerous, and it has been said that the contractee should be held liable for the use of such an agency, and that he cannot escape liability by contracting with another to perform the work: *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495. In another case it is said that “whoever aids, assists, or procures another to commit a trespass,” as by the act of contractors in the throwing of rocks through the operation of blasting, “no matter with what motive, or whether intended or not, is liable as a principal to compensate for the injury done”: *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399, 418. And, in Missouri, it is actionable negligence to violate an ordinance which prohibits the blasting of rock without first covering it with timber, and where a contractor violates such an ordinance, causing injury to third persons, the contractee is answerable in damages for such unlawful act, though he had no control over the contractors in the execution of their work: *Brannock v. Elmore*, 114 Mo. 55. A contractee is also liable for injuries caused by the negligence of a contractor in blasting, where it was the duty of the contractee to keep the premises in a safe condition: *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166.

In New York, the doctrine adhered to is that one who, in the reasonable use of his land, blasts rocks thereon with due and proper care, is not liable for the inevitable damage caused thereby to neighboring property; that if independent contractors do the blasting, without negligence, no one is liable, though the injury is the inevitable result of the blasting; and that the owner is not answerable for the negligence of the independent contractors in not doing the work carefully: *French v. Vix*, 143 N. Y. 90, 93; *Roemer v. Striker*, 142 N. Y. 134; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Berg v. Parsons*, 156 N. Y. 109, 66 Am. St. Rep. 542; and see *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348.

Other cases hold that a contractee or his agent is not liable for injuries to third persons negligently caused by a contractor in blasting: *Brown v. Lent*, 20 Vt. 529; and that cities are not liable for such injuries: *Blumb v. Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *Joliet*

v. Seward, 86 Ill. 402, 29 Am. Rep. 35. Compare *Murphy v. Lowell*, 128 Mass. 396, 35 Am. Rep. 381. Neither is a contractor liable for such injuries caused by the employés of a subcontractor: *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Tibbetts v. Knox etc. R. R. Co.*, 62 Me. 437. In *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, the employer was held liable on the ground that the contractor or employé was a servant of the contractee: Compare *McNamee v. Hunt*, 87 Fed. Rep. 298.

Liability for Negligence in Cases Concerning Buildings.—The liability of an owner for the negligence of a contractor in erecting or safely constructing a building has been noted above in the subdivision concerning acceptance of work and ratification: See, also, *Brown v. Accrington etc. Mfg. Co.*, 3 Hurl. & C. 511. The owner of land who contracts with a competent and skillful builder to erect a building thereon, and delivers the premises into the actual, exclusive possession of the contractor for a definite period, is not liable for damages to a stranger passing by, caused by the negligence of such contractor. The remedy of the party injured is against the contractor, or the corporation within which the property is situated: *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334. The owner of a building, however, cannot dictate that it shall be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder: *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39. Compare the subdivision, *infra*, on the liability of contractors.

Liability for Negligence in Cases Concerning Bridges.—A contractee, who has used ordinary care in selecting an experienced builder to erect a bridge for him, is not ordinarily liable for injuries occasioned to a third person by a fall of the bridge, where the builder had supervision and control of the work, unless it appears that the defendants had knowledge of the defects from which the accident arose and neglected to repair them: *Mansfield etc. Coke Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; but a city is liable to a citizen for an injury sustained in consequence of the defectiveness of a bridge forming part of a public street, although it was at the time in process of repair by an independent contractor: *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5. For other cases, see subdivision, *supra*, concerning liability for negligence in performing contracts for railroad work.

Liability for Negligence in Interfering with Highways.—If a person interferes with or obstructs a highway, or leaves it in a defective or dangerous condition, he is liable for injuries occasioned to travelers by such act, though it was done by an independent contractor, or his employé: *Robbins v. Chicago*, 4 Wall. 657; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 493; *Burgess v. Gray*, 1 Com. B. 578;

but if the act, such as leaving a pile of boards in the road, to be used in the alteration and repair of a house, was not authorized by the contractee, and the latter had no control over the contractor, who was a carpenter engaged to make the alterations and repairs, the contractee would not be answerable for the act, which was done by an employé of the contractor: *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743. A "district council" must respond in damages for an injury caused by the negligence of a contractor engaged to repair a highway in leaving a pile of dirt in the street: *Penny v. Wimbledon Urban Council*, [1898] 2 Q. B. 212, affirmed in the same case, [1899] 2 Q. B. 72. The negligence, in such a case, is not casual or collateral to the employment: *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72. So one who engages a gasfitter to put a lamp in repair is answerable where he hangs it over a highway, and, because of its defective condition, it falls and injures a traveler: *Tarry v. Ashton*, 1 Q. B. Div. 314. Even where independent contractors are authorized to perform work upon a highway, which, from its nature, is likely to involve danger to persons using the highway, the contractee is bound to take care that those who execute the work for him do not negligently cause injury to such persons: *Holliday v. National Tel. Co.*, [1899] 2 Q. B. 392, a case in which a lamp, used in a certain business near a highway, exploded from being out of order, and scattered molten lead about, some falling on the plaintiff, who was passing by upon the highway. This was also not a case of mere casual and collateral negligence, but a case of negligence in the very act which the contractor was engaged to perform. A township is liable for injuries occurring through a contractor's negligence in repairing highways: *Mahanoy Township v. Scholly*, 84 Pa. St. 136. Compare *Woods v. Parish*, 21 D. C. 540; *Sanford v. Pawtucket St. Ry. Co.*, 19 R. I. 537; and see the subdivision, *supra*, on the liability for negligence in performing work for cities.

Liability for Negligence in Cases Concerning Landlord and Tenant.—A landlord, in making repairs and improvements, upon the demised premises, owes to his tenant the duty of exercising reasonable care not to make the same inconvenient or dangerous, and he cannot absolve himself from that duty by placing the work in the hands of an independent contractor. He is liable, if the tenant suffers injury because of a defect occurring during the progress of the work, through the negligence of an independent contractor: *Wilber v. Follansbee*, 97 Wis. 577; *Wertheimer v. Saunders*, 95 Wis. 573; *Evans v. Murphy*, 87 Md. 498; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238. The landlord is liable, where he occupies the upper story of a building and employs a mechanic to put in a skylight in the roof, who neglects to cover the same, so that it rains through the opening and thereby injures the goods of a tenant who occupies the first story: *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; and he is also answerable to his tenant for injuries to the latter's prop-

erty, by reason of alterations in the building made in pursuance of a defective plan adopted by the landlord, although he employed a competent builder to do the work: *Evans v. Murphy*, 87 Md. 498. The landlord is liable where he retains control of the work: *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Mumby v. Bowden*, 25 Fla. 454. If a landlord authorizes an adjoining owner to tear down and rebuild a party-wall of a store occupied by his tenant, he is answerable, severally or jointly, with the party doing the work for injuries resulting to the property of the tenant: *Northern Trust Co. v. Palmer*, 171 Ill. 383. A landlord, however, is not liable to a tenant who consents to repairs for injuries caused by a contractor's negligence: *Jefferson v. Jameson etc. Co.*, 165 Ill. 138. Nor is he liable, unless he owes a duty, where he has no control over the means employed in doing the work: *Lawrence v. Shipman*, 39 Conn. 586. Compare *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; and see *Stewart v. Putnam*, 127 Mass. 403.

Liability for Negligence in Withdrawing Lateral Support.—A person who employs an independent contractor to make an excavation on the contractee's own lot of ground must respond in damages for an injury thereby caused to the house of an adjoining lot owner, if he has the right of lateral support, where such injury might reasonably have been anticipated as a probable consequence of the excavation: *Bonaparte v. Wiseman*, 89 Md. 12, 24; *Mamer v. Lussem*, 65 Ill. 484; *Bower v. Peate*, 1 Q. B. Div. 321; *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439; *Stevenson v. Wallace*, 27 Gratt. 77; and notice has not been given to the adjoining owner to protect his property: *Bonaparte v. Wiseman*, 89 Md. 12; or notice given of a change of plan: *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439. It is the contractee's duty to see to the doing of that which is necessary to prevent the mischief: *Bower v. Peate*, 1 Q. B. Div. 321; and he is liable, of course, where it is unlawful to proceed with the excavation without supporting an adjoining wall, though the work of excavation is done by a contractor: *Dorrity v. Rapp*, 72 N. Y. 307. Compare *Ketcham v. Newman*, 141 N. Y. 205. A city is liable for damages in grading a street whereby lands abutting thereon are deprived of lateral support: *Smith v. Seattle*, 20 Wash. 613, 617. In the absence of a right of support there would be no liability on the part of the owner for injury occasioned by the negligence of the contractor's workmen in making the excavation; nor would such owner be liable for their tortious acts in carrying away the adjoining owner's materials without the excavator's authority: *Gayford v. Nicholls*, 9 Exch. 702. In *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719, it is held that the owner of land is not liable for injuries caused to an adjoining lot, by excavations made for building purposes on his own land by a contractor to whom he had let the job. And in California it is held that, if the work of excavation for a building is let out, by contract, by a coterminous owner, and if the contract is silent as to the mode of excavation, the owner is not answerable for injuries

caused by the contractor or his servants in doing the work: *Aston v. Nolan*, 63 Cal. 269, 273.

Liability for Negligence in Doing Work in Mines.—If a mine is in the hands of another than the owner, who is working it under a contract for a royalty, and a laborer in the mine is injured by a portion of the roof falling upon him, the owner is not liable: *Smith v. Belshaw*, 89 Cal. 427. The owner of a mine contracted with others to work it, and it was agreed that the contractors, and not the owners, should be answerable for injuries to workmen. It was also stipulated that when the contractors repaired the mine, it should be done under the supervision of the owner's superintendent. The mine was in proper condition when the contractors took possession. A workman was killed by the falling of a rock from the roof, and it was held that the owners were not liable: *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164, 43 Am. Rep. 456. Mine owners are not liable to an infant's parents for his death, where his employment by independent contractors to mine ore for the mine owners was wrongful: *Harris v. McNamara*, 97 Ala. 181; but where a mining company contracts for the removal of ore, and assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employes for injury in consequence of the neglect of that duty: *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423.

Liability for Negligence in Erecting Scaffolds.—If a person contracts with another to build a scaffold or staging on premises, and it is the duty of the contractee to avoid danger by the use of proper care, he is answerable for injuries arising from the defective condition of the structure, not apparent to the one using it when such injuries result, and which was caused by negligence in its construction: *Mulcahey v. Methodist etc. Soc.*, 125 Mass. 487, 489. Thus, O. contracted to put a cornice on the defendant's mill, the defendant agreeing to erect the scaffolding necessary for the purpose free of cost to O. The defendant erected the scaffolding so negligently that it fell, killing the plaintiff's intestate, a servant of O., who was at work upon it, and it was held that the defendant was liable: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387. The law imposes on everyone a duty to avoid acts in their nature dangerous to the lives of others. Thus, one of the defendants, a painter, contracted to paint the interior of a dome, and having no knowledge of building scaffolds, contracted with the other defendant, an experienced scaffold builder, to erect a first-rate scaffold therefor. The builder defectively constructed the scaffold, and it gave way, and caused the death of the plaintiff's intestate, who was at work upon it in the master painter's employ. It did not appear that the master knew or had reason to know of the defect. It was held that the master was not liable, but that the builder was: *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. But where a staging was built around a ship, under a contract with the ship owner,

who employed a person to paint the ship, and, in the course of the work, the painter fell from the staging and was injured by reason of a defect in its condition, it was held that the contractor who built the staging was not answerable for such injury, because he owed no duty to the plaintiff to supply a reasonably safe staging: *Heaven v. Pender*, 9 Q. B. Div. 302. Compare *Knight v. Fox*, 5 Exch. 721.

Liability for Negligence of Stevedores.—The owners of a vessel are not answerable for injuries caused by the negligence of a stevedore, or his employés, especially where the stevedore is an experienced one, and is employed, as an independent contractor, to load or unload the vessel, and has control of the work: *Linton v. Smith*, 8 Gray, 147; *Sweeny v. Murphy*, 32 La. Ann. 628; *Murray v. Currie*, L. R. 6 Com. P. 24. Such owners are not liable for injuries caused by the negligence of the stevedore or his employés in using defective tackle furnished by the vessel, when it is shown that the tackle had no apparent defect, and that the stevedore, being an independent contractor, employed his own labor and pursued his own methods in doing the job. The vessel's obligation or duty is performed when it furnishes to an experienced stevedore a tackle apparently good and sufficient and satisfactory, and it has nothing to do with the working of the tackle: *Riley v. State Line Steamship Co.*, 29 La. Ann. 791, 29 Am. Rep. 349; *McCall v. Pacific Mail etc. Co.*, 123 Cal. 42. But compare *The Rheola*, 19 Fed. Rep. 926, and *The Terrier*, 73 Fed. Rep. 265. Such owners are liable, however, if they retain control: *McGough v. Ropner*, 87 Fed. Rep. 534.

Liability for Negligence Concerning Walls.—If, in rebuilding a house, the owner directs the contractors to make use of an old wall, which is defective, and by reason of such defects a floor of the building and wall fall, causing personal injuries, the owner must respond in damages: *Horne v. Nicholson*, 56 Mo. 220. If a proprietor undertakes to do upon his lot that which is dangerous in its nature to adjacent proprietors, he must use reasonable care to prevent the doing of an injury to them, whether he does the work himself or procures it to be done by an independent contractor. So if the owner of a lot procures a contractor to enter thereon for the purpose of removing a wall, which, through the negligence of the contractor, is caused to fall upon and injure the adjacent premises, the lot owner is liable for the damages thus occasioned: *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374. The defendant contracted with masons for the erection of a party-wall on his land and that of an adjoining owner, the masons to furnish the materials and perform the labor. The wall was completed and accepted, but, owing to its defective and unsafe condition, it afterward fell and crushed the building of the adjoining owner. It was held that the defendant was liable for the damages, whether due to his negligence or that of the masons: *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224. The owner of a house, which had been burned, suffered the walls to stand in an unsafe and tottering condition for three weeks, mean-

time removing the rubbish. He then contracted for the rebuilding of the house. About seven or eight weeks after the fire, and while the premises were in the charge and possession of the contractor, one of the walls fell on the buildings of an adjoining owner. It was held that the owner of the ruinous premises was liable for the damage: *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98. A party is not relieved from liability for injuries resulting from the fall of a wall, on the ground that it was constructed by an independent contractor, if the defect in the wall arose from the plans and specifications adopted by such party, and not from negligence of the contractor in carrying out such plans and specifications: *Lancaster v. Connecticut etc. Ins. Co.*, 92 Mo. 460, 1 Am. St. Rep. 739. Compare *Pender v. Raggs*, 178 Pa. St. 337. But if a contractor is employed to take down a wall, and the doing of the work is not intrinsically dangerous, but injuries result to third persons from the negligent manner in which the work is done, the contractor alone is liable, though the wall had become weakened by age and decay, if it was safe as it stood and would not have fallen or occasioned any injury but for the negligent mode in which the contractor undertook to perform his contract: *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Butler v. Hunter*, 7 Hurl. & N. 826.

Liability of Contractors.—A subcontractor bears the same relation to the contractor that the contractor does to his employer, and the rule governing each relation is the same: See note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 201; *Cuff v. Newark etc. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Water Co. v. Ware*, 16 Wall. 566; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Baumeister v. Markham*, 101 Ky. 122, 72 Am. St. Rep. 397; *Doran v. Flood*, 47 Fed. Rep. 543; *Wray v. Evans*, 80 Pa. St. 102; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Pioneer etc. Construction Co. v. Hansen*, 176 Ill. 100; *Slater v. Mersereau*, 64 N. Y. 138; *Pearson v. Cox*, 2 C. P. 369; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Coomes v. Houghton*, 102 Mass. 211; *Cotter v. Lindgren*, 106 Cal. 602, 46 Am. St. Rep. 255. Independent contractors are, as a rule, liable for their own negligence or other torts: *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Pfau v. Williamson*, 63 Ill. 16; *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545; *Robinson v. Webb*, 11 Bush, 464; *Casement v. Brown*, 148 U. S. 615; *Railroad Co. v. Hanning*, 15 Wall. 649; *Hughes v. Railway Co.*, 39 Ohio St. 461; *Barton v. McDonald*, 81 Cal. 265; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Fulton etc. R. R. Co. v. McConnell*, 87 Ga. 756; *Hunt v. Pennsylvania R. R. Co.*, 51 Pa. St. 475; *O'Hale v. Sacramento*, 48 Cal. 212; *Creed v. Hartman*, 29 N. Y. 591, 86 Am. Dec. 341. Compare the subdivision, *supra*, on the general rule of nonliability. The exceptions to this rule exist in the case of statutory duties imposed on individuals or corporations from which they cannot acquire exemption by delegating performance to another, and of contracts for the perform-

ance of unlawful acts, or acts which will create a nuisance, or are necessarily attended with danger to others. These exceptions have already been considered: See *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231. A contractor is liable, of course, where he assumes liability: *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *Clark v. Fay*, 8 Ohio St. 358, 72 Am. Dec. 590; but where the cause of injury is the direct result of acts which the contractor has agreed and is authorized by his employer to do, the contractee is also liable to the injured party, and an action will lie against the employer and contractor jointly: *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399; *Robbins v. Chicago*, 4 Wall. 657, 679; *Hundhausen v. Bond*, 36 Wis. 29; *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227. An action may be maintained against a contractee or a contractor, or both, if the work was inherently and, according to the contractor's plan and location, a dangerous obstruction, such as ordinary prudence should have guarded against: *De Baker v. Southern etc. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237. But a contractor, who performs his work with skill and in a workmanlike manner, under the direction of an architect, and on the latter's plan, is not liable if the plan is defective and injury is caused by the falling of the building, where the defect was not known to the contractor: *Daegling v. Gilmore*, 49 Ill. 248. Compare *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227.

In conclusion, it may be said that, where work is being done by contract, and injury is caused by negligence, there should be a discrimination between the act of the contractee and the act of the contractor; that negligence in a matter collateral to the contract should not be confused with that in which the thing contracted to be done causes the mischief; and that in all cases where the defendant was held liable, outside of special contract, there seems, apparently, to have been a duty cast upon him.

LEWIS v. SYMMES.

[61 OHIO STATE, 471.]

STATUTES.—A CHANGE OF JUDICIAL CONSTRUCTION in respect to a statute should be given the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment—that is to say, its operation must be prospective, not retroactive.

INJUNCTION AGAINST ASSESSMENT FOR PUBLIC IMPROVEMENT—STATUTE—CHANGE OF JUDICIAL CONSTRUCTION—OBLIGATION OF CONTRACTS—ESTOPPEL.—When it appears that an assessment was levied under a legislative act to

pay for a public improvement in a county, such as the opening and improvement of a highway, and it is assumed that the law, at the time of its enactment, and of the contemplated improvement, was believed, under former decisions of the supreme court, to be valid, but which is conceded to be unconstitutional, if tested by recent decisions of that court, that the improvement was beneficial to the public, but of special benefit to a few owners in the assessment district defined in the act, upon whom it was sought to impose the burden of making the improvement, to the relief of the county, whose representatives secured the passage of the act, such owners, where they did not actively promote the improvement in any way, may, when an attempt is made to enforce the assessment, enjoin its collection, although they knew of the improvement and of the intention to make the assessment, for an attempt to enforce it does not involve any rights arising out of contract, and the owners are not, therefore, estopped, under the circumstances, to deny its validity.

Several suits were brought by the defendants in error, Symmes and others, to prevent the collection of assessment upon their lands for the improvement of Columbian avenue, in Hamilton county. The act under which the improvement and the assessments were made was passed April 12, 1893. The plaintiffs relied upon the act being unconstitutional. The act provided that one-half of the cost and expense of the improvement should be assessed upon the owners of certain lots and lands in the assessment district defined in the act, and that the other half, together with any bonds issued by the commissioners for the same, should be levied and assessed upon all of the taxable property in the county. Lewis, the auditor, and the commissioners, the defendants and plaintiffs in error, averred in their answers that the road was of general benefit to the people of the county and of special benefit to the plaintiffs; that the plaintiffs knew of the improvement and of the intention to make the assessment, but did not take effective measures to prevent the expenditure of money for the improvement; that the act had, before the making of the improvement, been adjudged valid by the circuit court of Hamilton county; that two of the plaintiffs had presented to the commissioners claims for damages for land taken from them for the improvement; and that such claims had been allowed and paid. Perpetual injunctions were allowed by the court of common pleas. This judgment was affirmed by the circuit court, and the defendants prosecuted error to secure a reversal.

Rendigs, Foraker & Dinsmore, county solicitors, for the plaintiffs in error.

Symmes & Hayward, R. de V. Carroll, and Hollister & Hollister, for the defendants in error.

⁴⁸⁴ SHAUCK, J. It is admitted that the act under which the improvement was made is unconstitutional if tested by our recent decisions. It is, however, insisted ⁴⁸⁵ by counsel for the plaintiffs in error that, if tested by the decisions of this court rendered before the passage of the act, it would be found valid, and that only prospective effect should be given to the later decisions by which similar acts have been adjudged to be void. The definite point is that in *State v. Commissioners*, 35 Ohio St. 458, decided in 1879, this court held a similar act valid, and that case was not overruled until we decided *Hixson v. Burson*, 54 Ohio St. 470, in 1896, after the passage of the *Columbian avenue act*, and after the improvement for which it attempted to provide had been undertaken. It would be quite easy to point out that the *Columbian avenue act* has constitutional infirmities in addition to those found in the act which was held to be valid in *State v. Commissioners*, 35 Ohio St. 458. One such infirmity is indicated in *State v. Commissioners*, 54 Ohio St. 333, where it was not found necessary to overrule the earlier decision. But the consideration of the case may be advanced and full justice done to the argument of the counsel for the plaintiffs in error if we follow them in the assumption that, when the *Columbian avenue act* was passed and the contemplated improvement was made, the belief that the act in all of its parts was valid was justified by rules of constitutional interpretation which had been defined in, or were deducible from, the former decisions of this court. It is not assumed that we had ever decided that this particular act is valid, for it is admitted that it was never before us.

The doctrine which is invoked as applicable to the case, in view of the assumed state of our decisions at the passage of the act, has been developed through many difficulties and over much opposition. This was inevitable because of the general recognition of the rule that legislative acts in contravention of constitutional ⁴⁸⁶ limitations are void, and of the other rule that judicial decisions declare, but do not make, the law. Nevertheless, it appears from numerous cases, many of which are cited in the briefs, that the doctrine is now established. It is, however, to be observed with respect to many of those cases that they involve the consequences of a change of decision as to the validity or interpretation of the same statute; and, with respect to all of them, that the rights which they enforce, notwithstanding the change of judicial decision, are rights

resting in contract. An accurate statement of the rule and the reason by which it is supported will obviate error in its application. Such a statement is found in the opinion of Chief Justice Waite in *Douglass v. County of Pike*, 101 U. S. 677: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, making it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." This compendious statement of the rule and its reason meets the requirements of all the cases cited. Its purpose is to secure the full operation of the constitutional prohibition of laws impairing the obligation of contracts. It is apparent, alike from the terms in which the rule is stated and from its reason and purpose, that it can be invoked only for the enforcement of rights which rest in contract. It does not appear that it has ever been applied to any other purpose. 487 Since the validity of the bonds issued by the commissioners under the Columbian avenue act is not drawn in question in the cases before us, it is quite evident that the courts below did not err in refusing to apply the rule stated. The position of the plaintiffs in error derives no support from *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321, or the other cases of which it is a type. They merely hold that the constitutional provision against laws impairing contracts preserves not only the contracts themselves, but all existing remedies which are necessary to their practical enforcement. Nor is their position sustained by the cases in which, out of regard for the stability of their decisions, courts have refused to reconsider cases already decided in order that there might be applied different rules laid down in later cases. There appears to be no reason why these cases should not be determined by the general rule that unconstitutional enactments are nullities: *Norton v. Shelby County*, 118 U. S. 425. The plaintiffs in error assert no right arising out of contract, but seek to impose upon the property of a few citizens the burden of making the improvement, to the relief of the county whose representatives, according

to a well-known legislative custom, secured the passage of the unconstitutional act.

It is admitted that the parties who seek the relief from these assessments did not actively promote the improvement in any way. But it is contended that since none of them opposed it except by presenting ineffectual protests to the commissioners, they are now estopped to deny the validity of the assessment by which it was anticipated that one-half of the cost of making the improvement would be paid. The proposition is that since they did not take effective measures to prevent the expenditure of money for an improvement by which the public are benefited, and ⁴⁸⁸ they are especially benefited, they should not now be heard to object to the validity of the assessments by which it was expected that money would be realized for the payment of the bonds. This proposition is said to be supported by *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438. The opinion of the circuit court shows that this point was there determined on the authority of *Columbus v. Agler*, 44 Ohio St. 485. The relation of these cases is intimate. The later case arose in the circuit court of Franklin county where that court, as the successor of the district court, was engaged in determining the validity of assessments for the improvement of High street, pursuant to the mandate of this court in the *Tone* case, and in the later case it was determined, that inasmuch as the public, in making the unauthorized improvement, was upon a street which it owned and was not a trespasser as to Mrs. Agler, "she was not required to do anything until steps were taken to make the assessments upon her property." The application of this doctrine to the cases before us is obvious. If, therefore, *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, would justify the purpose for which it is cited, it must be regarded as modified by *Columbus v. Agler*, 44 Ohio St. 485. That it was not intended to give such important effect to a void enactment should be inferred from the fact that the court did not either overrule or modify *Wright v. Thomas*, 26 Ohio St. 346, which is full authority for the proposition that the doctrine of estoppel cannot be invoked in a case of this character.

Judgments affirmed.

INJUNCTION AGAINST ASSESSMENTS.—A court will not enjoin the collection of taxes and assessments unless some special reason is shown for equitable interference: See monographic note

to *Holland v. Mayor*, 69 Am. Dec. 199, treating of the subject; note to *Kelly v. Minneapolis*, 47 Am. St. Rep. 612. That equity will interfere, by injunction, to restrain the collection of an illegal and void special assessment, though there is nothing to show it to be inequitable, see note to *Howell v. Tacoma*, 28 Am. St. Rep. 87.

CINCINNATI DAILY TRIBUNE COMPANY v. BRUCK.

[61 OHIO STATE, 489.]

MALICIOUS PROSECUTION OF CIVIL ACTION.—NO RECOVERY can be had by a defendant against a plaintiff for the malicious prosecution of a civil action where there has been no arrest of the person or seizure of property.

MALICIOUS PROSECUTION OF CIVIL ACTION—DAMAGES FOR, WHERE THERE IS NO SEIZURE OF PROPERTY. An incorporated newspaper company has no cause of action for the malicious prosecution of a suit against it by one of its stockholders, on a false averment of its insolvency, to the great injury of its credit and business, where there was no seizure of its property.

Aaron A. Ferris, for the plaintiff in error.

William H. Jones, for the defendant in error.

489 THE COURT. August W. Bruck brought suit against the Cincinnati Daily Tribune Company for the publication of a libel concerning him in its newspaper. The company plead, by way of counterclaim, that just previous to the libel the plaintiff, a stockholder of the company, maliciously and without probable cause, commenced a suit against it for dissolution and the appointment of a receiver, on the false averment that it was insolvent. The application was at once heard, denied, and the suit dismissed. It is then averred **490** that the suit worked great injury to the credit of the company, prevented a sale of the property then being negotiated, and otherwise greatly embarrassed it in business. Issue having been made up, the case was tried to a jury; and at the close of the defendant's evidence, the court, on motion of the plaintiff, withdrew from the consideration of the jury all the evidence offered by the defendant on its counterclaim, but, in its charge, left it to be considered in mitigation of damages.

The ruling of the court presents the question whether the facts pleaded in the answer constitute a counterclaim to that of the plaintiff. If, however, the facts stated constitute a cause of action in favor of the defendant for the recovery of dam-

ages against the plaintiff for the malicious prosecution of the suit for the appointment of a receiver, it is very clear that they would constitute a counterclaim in this action. They are connected with the subject of the action; and this is sufficient to warrant their being pleaded as a counterclaim: Rev. Stats., sec. 5072; Swan on Pleading and Practice, 259, note.

The real question is, Do they constitute a cause of action in favor of the defendant against the plaintiff? We think not. It is a well-settled general rule that no recovery can be had by a defendant against a plaintiff for the malicious prosecution of a civil action where there has been no arrest of the person or seizure of property. The cases relied on by the plaintiff in error do not support its claim. That of Newark Coal Co. v. Upson, 40 Ohio St. 17, arose from a suit where a temporary injunction had been obtained on false and malicious averments. A temporary injunction imposes a restraint upon the owner over his property, as hurtful to him as if it were in fact seized; and it was held that for the malicious ⁴⁹¹ prosecution of such suit an action would lie. The case of Pope v. Pollock, 46 Ohio St. 367, 15 Am. St. Rep. 608, arose from the malicious prosecution of suits in forcible entry and detainer. Judgments in such suits are not conclusive. The proceeding may be commenced and recommenced without limit, unless enjoined, and hence affords an opportunity for the gratification of malice and oppression; and when this is the case an action may be maintained by the injured party for the recovery of damages. In the above case a suit had been brought and a verdict of not guilty rendered. Another was brought with the same result. A suit for malicious prosecution was then brought and sustained. The case stands upon a clear exception to the general rule. No ground for an exception appears in this case. Had a receiver been appointed and possession taken of the defendant's property, a different case would have been presented.

Affirmed.

MALICIOUS PROSECUTION OF CIVIL ACTION—ACTION FOR DAMAGES.—A civil suit, no matter how malicious or unfounded, cannot be made the ground of an action for malicious prosecution and the recovery of damages, unless there has been an actual interference with either a person or his property: Norcross v. Otis, 152 Pa. St. 481, 34 Am. St. Rep. 669. That an action will lie for the malicious prosecution of a civil action without probable cause, see O'Neill v. Johnson, 53 Minn. 439, 39 Am. St. Rep. 615. Compare Kolka v. Jones, 6 N. Dak. 461, 66 Am. St. Rep. 615.

WHEELING AND LAKE ERIE RAILROAD COMPANY v. KOONTZ.

[61 OHIO STATE, 551.]

CARRIERS.—THE RIGHT OF STOPPAGE IN TRANSITU may be exercised at any time while the goods remain in the possession of the carrier as carrier.

CARRIERS—TRANSIT DOES NOT END BEFORE DELIVERY—STOPPAGE IN TRANSITU.—A vendor of lumber may recover possession of it, by stoppage in transitu, where there has been no delivery to the consignee, and the lumber is still in transit, when it appears that it has been shipped and has arrived at its point of destination, that notice of such arrival has been given to the consignee, that the latter did not pay the freight nor manifest any intention of receiving the lumber, and that it remains in the custody of the carrier, without any agreement that the latter shall hold and care for it as agent of the consignee.

SALE BY CONSIGNEE TO CARRIER BEFORE DELIVERY—BONA FIDE PURCHASER.—If a consignee, after a notice of the arrival of goods, fails to pay the freight thereon, and manifests no intention of receiving them, a sale thereof by the consignee to the carrier, in consideration of the unpaid freight thereon and other pre-existing indebtedness, consisting also of unpaid freight bills, does not constitute the carrier a bona fide purchaser.

Action brought by Koontz and others against the railroad company for the conversion of a carload of lumber, consigned to the Gashe Lumber Company. The plaintiffs obtained a judgment, and the company petitioned in error to reverse it.

Swayne, Hayes & Tyler, for the plaintiff in error.

Marshall & Fraser, for the defendants in error.

559 DAVIS, J. The only right of the vendors, under the facts appearing in this case, if any, was to recover the possession of the carload of lumber by stoppage in transitu. This they might do at any time while the lumber remained in the possession of the carrier as carrier. It had been carried to its destination, but it is not claimed that any manual delivery had been made to the consignee. There was no delivery to the consignee unless it was by construction. The facts which are claimed to constitute a constructive delivery, as they appear in an agreed statement of facts, are that the car arrived at its destination, Toledo, Ohio, on February 2, 1895; that the carrier notified the consignee of the arrival of the lumber **560** and that thereafter, up to and including February 7, 1895, the car, with the lumber remaining thereon, remained upon the yard

track of the defendant in Toledo, for delivery to the consignee; and that on or about the seventh day of February, 1895, the consignee sold the said car of lumber to the defendant for the sole consideration of a pre-existing indebtedness, which consisted of the freight charges on the carload of lumber in question and other indebtedness. These facts show no delivery, either manual or constructive, unless the sale by the consignee to the defendant implies it. It does not appear that the consignee paid the freight or in any manner put himself in position to demand and enforce the possession of the lumber; nor does it appear that there was any agreement between the consignee and the defendant by which the former assumed the possession of the lumber and constituted the latter his agent to hold and care for the same. But in the absence of these necessary indications of a constructive delivery to the consignee, the defendant retained the custody and control of the property under a sale which is based partly on the consideration of the freight thereon, which must have been paid before a delivery could be presumed to have taken place, and partly on the consideration of other pre-existing debts, which were admitted by counsel on the oral argument to consist also of unpaid freight bills. Such a sale we do not think would constitute the defendant a bona fide purchaser; and we are of the opinion that the lumber was still in transit at the time when the plaintiffs gave notice of stoppage in transitu and tendered to defendant the freight due to it for the transportation of the lumber. The case having been twice reported heretofore (5 N. P. 15; 15 C. C. 288), it is unnecessary to review the authorities cited by counsel, nor to cite others.

The judgment of the circuit court is affirmed.

STOPPAGE IN TRANSITU — DELIVERY—AGENCY.— While goods are in the possession of a carrier, as carrier, they are liable to stoppage in transitu: See extended note to *Sangslaff v. Stix*, 60 Am. Rep. 51. The vendor's right of stoppage continues until the goods have actually or constructively passed into the possession of the vendee: See monographic note to *Allen v. Maine Cent. R. R. Co.*, 1 Am. St. Rep. 312, on how the right of stoppage in transitu is exercised; *Harris v. Tenney*, 85 Tex. 254, 34 Am. St. Rep. 796. The transitus is not at an end so long as the goods are still in the hands of the carrier subject to his lien for freight: Note to *Ocean Steamship Co. v. Ehrlich*, 30 Am. St. Rep. 166; or until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; but the carrier may hold the goods, after they have arrived at their destination, as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid": See extended note to *Sangslaff v. Stix*, 60 Am. Rep. 51, 54.

STOPPAGE IN TRANSITU—LEAVING GOODS IN HANDS OF CARRIER, WITH FREIGHT UNPAID.—If goods, after reaching their destination, remain in the possession of a carrier, with the freight unpaid, it will be presumed that they continue subject to the right of stoppage in transitu, in the absence of evidence that the carrier has become the agent of the purchaser and is keeping the goods for him as such, and not as carrier: *Jeffris v. Fitchburg R. R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919. If the consignee suffers them to remain in the carrier's hands under circumstances which show no express or implied agreement on the part of the carrier to hold them specially on account of the vendee, or which do not indicate clearly that any immediate better possession by the vendee is contemplated, the vendor still retains the right of stoppage: *Note to Sangsclaff v. Stix*, 60 Am. Rep. 51.

SALES.—THE RIGHT OF STOPPAGE IN TRANSITU is not defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right; for there must be a purchase for value, without fraud, to have this effect: *Kingman v. Denison*, 84 Mich. 608, 22 Am. St. Rep. 711.

OHIO AND INDIANA TORPEDO COMPANY v. FISHBURN.

[61 OHIO STATE, 608.]

WITNESSES.—OPINION EVIDENCE IS ADMISSIBLE to prove an evidentiary fact which is not a subject of common knowledge, or one of which the jury can judge as well as the witness, and which tends to prove a probative fact involved in the issue.

WITNESSES—OPINION OF EXPERT IN SHOOTING OIL- WELLS—ADMISSIBILITY OF.—In an action to recover damages for personal injuries alleged to have been caused by the negligent discharge of a nitroglycerin torpedo in an oil-well, it is competent for an expert witness, familiar with the business of "shooting" oil-wells, having knowledge that such explosions force gas out of a well, and knowing the danger incident to the gas coming into contact with the atmosphere and with fire, particularly where the condition of the atmosphere is such that, when the gas is liberated, it settles to the surface of the earth, to testify whether or not the hour of 7:30 o'clock P. M., on the seventh day of September, in any year, would be a proper time to explode such a torpedo in a well located in a village of twelve to thirteen hundred people, and within eighty to two hundred feet of houses in which lights or fires are burning.

JOINT LIABILITY—NEGLIGENCE.—In an action for personal injuries, where two defendants are jointly charged with negligence, one of them, who is shown to have been negligent, cannot escape liability by proving that the other defendant was also negligent.

INSTRUCTIONS MUST BE TAKEN AS A WHOLE, and if, considering the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous

simply because every condition to a recovery or a defense, is not embraced in each paragraph, where the paragraph excepted to is not in itself calculated to mislead.

Action by Fishburn and others against the torpedo company and one Grant, to recover for personal injuries alleged to have been caused by the joint negligence of those parties in exploding a torpedo, consisting of about one hundred quarts of nitroglycerin in a certain oil-well in the village of Cygnet. Grant owned and controlled the well, which was situated among business houses and dwellings occupied by citizens of the village; and the defendant company was engaged in the manufacture of nitroglycerin and exploding the same in oil and gas wells. On September 7, 1897, it placed a torpedo in Grant's well, which was exploded at 7:30 o'clock in the evening, at which time the atmospheric conditions were such that the gas forced out of the well by the explosion, settled to the surface of the earth and, through fire burning near the well at the time, became ignited, and exploded around the plaintiff, severely burning him. Grant denied all liability. The company claimed that the explosion of the torpedo was not within its control but was under the control of Grant, the owner. It was conceded that Grant himself dropped the instrument into the well which exploded the torpedo. At the time that it was exploded there was a fire near the well, under a boiler used in putting the torpedo in the well, and the company claimed that it was Grant's duty, before exploding the torpedo, to put out the fire, and that, by reason of his failing to do so entirely, the gas and oil around the boiler ignited and set fire to the well. There was a judgment for the plaintiff against the torpedo company alone, which brought a proceeding in error to reverse the judgment.

Gilbert Harmon and Jesse Stevens, for the plaintiff in error.

James & Beverstock, for Fishburn.

Baldwin & Harrington, for Grant.

612 SPEAR, J. Complaint is made by plaintiff in error of the admission of incompetent testimony against its objection, to the refusal of the trial court to give instructions to the jury requested by it, and to the charge as given.

1. The question of evidence. One Heron, a witness for the plaintiff below, had testified that he had resided at Bowling Green, Wood county, about nine years; that he had been engaged in the business of shooting oil-wells for about thirty

years, and was acquainted with the duties of one called upon to shoot a well, and knew the prevailing custom in that respect. He was then asked this question: "Now, I will ask you, Mr. Heron, suppose the shooter of a well brings one hundred quarts of nitroglycerin to said well, the nitroglycerin had been placed in the shells, lowered in the well, the well logged in, the derrick boarded up, except the opening facing toward the engine and belt house, the said well being at a distance of from eighty to two hundred feet of the residence and buildings adjoining and surrounding it, located in a village of twelve to thirteen hundred people; the condition of the atmosphere such that when the gas is liberated from the well, it settles to the surface of the earth; would the hour of 7:30 o'clock on the seventh day of September in any year when darkness had intervened so that fires and lights are lit in certain of such business and dwelling houses be, in your opinion, a proper time to shoot such well—that is to say, explode such torpedo therein?" Objection by the torpedo company was overruled and exception entered. Answer: "It is not a proper hour."

613 The objection urged is that this was error because the fact sought was a matter to be found by the jury. We do not think the admission of the evidence was error. The fact called for was evidentiary. It tended to prove one fact involved in the issue, but was not the ultimate fact in issue. Nor was it a subject of common knowledge, or one of which the jury could as well judge as the witness. As an expert his knowledge extended to all the dangers incident to an explosion of such a quantity of nitroglycerin at such a place, at such an hour, and with such surroundings. The average juror might not intelligently and fully determine the natural connection between cause and effect, and draw the proper conclusion from the general facts proven. At least the jury might be aided in that duty by the opinion of one whose experience and knowledge, especially as to the violent effects incident to the explosion, and as to the inflammable character of gas when mixed with the atmosphere and brought in contact with fire, and the extent of the attendant dangers, was greatly superior to their own: *Steamboat Clipper v. Logan*, 18 Ohio, 375; *Stewart v. State*, 19 Ohio, 302, 53 Am. Dec. 426; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Railroad Co. v. Schultz*, 43 Ohio St. 270, 54 Am. Rep. 805.

2. Instruction refused. The defendant, the Ohio & Indiana Torpedo Company, requested the court to charge the jury as

follows: "If the jury find from the evidence that the torpedo company's servant placed the torpedo in the well as directed by Grant, the owner, and that after it was in place, the owner said to the company's servant that he, the owner, would drop the go-devil; and if they further find that the torpedo was so placed and arranged that it could be surely exploded by dropping the go-devil, and that it was so exploded; and if the jury also find that the owner did explode said torpedo, then the jury would be justified in finding that the owner of the well assumed the duty ⁶¹⁴ and responsibility of exploding the torpedo himself; and, if the jury so find, then the responsibility of the torpedo company ended with the proper placing of the torpedo, and it cannot be made liable in damages to the plaintiff in this action."

The request was properly refused. The term, "as directed by Grant, the owner," is indefinite. It does not adequately express the supposition that Grant was in exclusive control of the work, and had assumed the duty and responsibility, as between him and the company, of exploding the torpedo himself so as to justify the conclusion that the company could not be liable in damages to plaintiff, even if, in any condition of the case, as between the defendants that conclusion would be warranted. It appears to be based upon the assumption that the company, although negligent itself as between it and the plaintiff, might escape responsibility by showing that Grant was also negligent, and leave out of view the duty of the company's servant to see that the explosion of the torpedo was made at a time when, under the circumstances, it was reasonably safe to explode it, as well with respect to the public as to the persons engaged in the work. Whether or not the company was negligent in that regard depended upon the evidence as to the entire transaction, and not wholly upon whether the agent placed the torpedo as directed by Grant and left it to be exploded by Grant, and was one of the questions to be determined by the jury upon the whole evidence.

3. The charge as given. At request of defendant, Grant, the court gave in the charge the following, viz.:

"1. If you find from the evidence that nitroglycerin is a dangerous explosive, and that the defendant torpedo company used nitroglycerin in shooting the oil-well in question, and if you further find that in the shooting of said well, gas was liable to arise therefrom, which gas was liable to ignite ⁶¹⁵ and explode, it was the duty of said torpedo company to so

handle, use, and control said nitroglycerin and not to explode the same, unless the conditions and surroundings of said oil-well were such as not to be liable to cause the gas arising from such well to ignite or explode, and if said defendant torpedo company failed or omitted to perform its duty in this regard such failure and omission would be negligence on the part of said torpedo company.

"2. If the business of shooting oil-wells is attended with danger to persons and property in the vicinity, and if such business requires the exercise of especial knowledge and skill, and if the defendant, the Ohio & Indiana Torpedo Company, at the time of shooting said well was a reputable company, skilled in said business, the defendant George E. Grant had the right to employ said company to do the shooting of said well, and had the right to rely upon the care and skill of said company in the performance of said work.

"3. If you find from the evidence that the defendant, George E. Grant, had the well in question in readiness to be shot, and that the defendant torpedo company undertook to do the work of shooting said well, and commenced the same in time so that in the usual and ordinary course of such work the same would have been completed before darkness set in, and if the defendant torpedo company from any cause delayed the work, so that it did not have said shot ready to explode until darkness set in, and if the jury find from the evidence that the exploding of said shot at that time was negligent, and that said torpedo company so caused the same to be done at that time, and by reason thereof an injury occurred to the plaintiff, the defendant, the torpedo company, would be liable therefor."

If the propositions were proper in themselves, we cannot see that the company should complain because they were given at the request of defendant Grant. ⁶¹⁶ If proper, the court might have given them of its own motion, and what the court might give *sua sponte* it surely might give upon request.

The objections urged are that the first request assumes that the company controlled the time of exploding the torpedo; that it was the duty of the company to see that the fires were put out, and that the company actually exploded the torpedo, while the second request applies to the company the doctrine of an independent contractor, and the third request assumes that there is evidence from which the jury might find that the company caused the torpedo to be exploded, while the evidence

conclusively shows that it was Grant, and not the company's servant, which caused the torpedo to be exploded.

We are unable to see that either objection is well taken. The company was then and there using nitroglycerin for the purpose of having it exploded in the well. The explosion was caused by dropping in the well an iron instrument pointed at one end, called a "go-devil." The "shooting" of the well, as it is called, was accomplished by the explosion of the torpedo, and was the purpose for which the company had been employed. Whether, therefore, the dropping of the go-devil was by the hand of the company's servant, or by the hand of Grant, could make no difference with the company's responsibility for the consequence as between it and the plaintiff, provided the dropping was a necessary step to the result which the company was there employed to produce. Evidence has been given, pro and con, to show the custom of the business with respect to whether or not, under the custom, it was the duty of the "shooter" to drop the go-devil and explode the torpedo, or of the owner, and the jury had been, at the beginning of the charge, instructed in substance that if the proof established that the owner of the well had, under the custom and usages of the business, power to decide when the well shall be shot, and that the shooter, after placing the ⁶¹⁷ nitroglycerin in the well, had no authority over the owner, either to hasten or delay the shooting, then the responsibility of the company ended in the placing of the torpedo in the well, and it would not be responsible for any negligence occurring at the shooting by reason of the lateness of the hour, or the condition of the atmosphere, and could not be held responsible for any consequence of such negligence. So that from the whole charge it became apparent that if the above hypothesis had been established by the evidence, then the shooting was in fact and law the act of the owner and not of the company, while if the evidence showed that the authority to decide when the torpedo should be exploded was with the company, and not with the owner, then the responsibility for consequences would be upon the company, and it would be the party who was "shooting the well." The expression "if the company used nitroglycerin in shooting the well" was the equivalent of saying that "if the company shot the well with nitroglycerin." This was given on the hypothesis, fully stated in preceding parts of the charge, that if it should be found that, as between Grant and the com-

pany, the latter had the authority to determine the time the well should be shot, then the company was to be considered as having shot the well, and, when so considered, was not an assumption on the part of the court either that the company controlled the time of exploding the torpedo, or that it actually exploded the torpedo. So, too, the court had, in other parts of the charge, given full instructions respecting the duty of seeing that the fires were out, and it was not necessary to repeat such instructions in these propositions, and it cannot reasonably be said that there was an assumption that such duty devolved on the company in this request. A charge to a jury is to be taken as a whole, and if, considering the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will reasonably ⁶¹⁸ enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery or a defense is not embraced in each paragraph, where the paragraph excepted to is not in itself calculated to mislead.

Respecting the charge as to independent contractor, it is enough to say that the company cannot well complain of what was said on that subject. Whether or not the plaintiff below might have objected to that instruction we need not consider.

Nor does the third request assume that there was evidence from which the jury might find that the company caused the torpedo to be exploded in the sense of dropping the go-devil by the hand of the company's servant. It was conceded that the act was the act of Grant, the owner, but there still remained the question whether in doing that he was not in fact acting for the company, and, if he was, then the company caused the same to be done, and there was evidence from which the jury might find the existence of that claim. In short, the record shows that evidence was adduced tending to establish each one of the conditions embraced within this proposition, and the jury was properly instructed as to the legal effect that would follow a finding on their part that the evidence established each hypothesis. Had the company desired instructions in connection with this more definite in detail, or embracing converse propositions of law, it was its privilege to ask for them.

The court further said to the jury: "If, under the facts as you find them, it was the joint duty of both the owner and

shooter engaged in a joint enterprise imposed upon them by the contract, neither can shift the responsibility exclusively to the other, but it belongs to both, and either of them would be guilty of negligence in not seeing that the fire was extinguished under the boiler, for it is conceded by both sides that the extinguishment of that fire is a ⁶¹⁹ necessary preliminary precaution in the business, and would be just as much the company's duty to see that the fire was extinguished under the boiler when the go-devil was dropped, as it would be to see that it was extinguished when it became necessary to explode the well by a jack-squib."

It is insisted that the court should not have told the jury that the foregoing "is conceded by both sides," and assumed that it would be the duty of the company to see that the fire under the boiler is extinguished "when it becomes necessary to explode a well with a jack-squib," because the matter as to jack-squib was only casually mentioned as something used in some supposed cases, but no necessity existed for it in this case, as the torpedo exploded when the iron was dropped; nothing such as is assumed was conceded, nor was any evidence offered tending to establish such facts.

There was some reference in the testimony to the custom of putting in of jack-squibs, and the record fails to show that the fact stated by the court was not conceded. The court had just before instructed the jury that: "If it was the exclusive duty of the defendant company to explode the well by dropping the go-devil as well as by putting in squibs, if that should become necessary, then, likewise, there was an obligation on said company to see that the fire in the boiler was extinguished, but perhaps not his exclusive duty under any circumstances, for possibly the owner would have the duty imposed upon him by virtue of his ownership in any event."

We are unable to see that this matter objected to was prejudicial. Even if not conceded, it was illustrative at most, and although not a very clear statement, cannot have worked prejudice.

The court also said to the jury: "You may look to the existence of the custom and say whether or not under the circumstances a prudent ⁶²⁰ shooter of oil-wells using nitroglycerin, should leave the extinguishment of the fire entirely to the owner in such an extraordinarily dangerous operation. If you find from the evidence that it was a negligent act to rely on such custom, the defendant company would be liable in this case,

just as the owner would be, because of any duty that rested upon him in respect of the extinguishment of the fire."

There was evidence respecting the custom as to whether or not it was usual for the "shooter" to leave the extinguishment of fires to the owner, and it was the claim of the company, alleged in the answer and sought to be sustained by proof, that the duty of looking to the extinguishment of fires was wholly on the owner. In the light of that claim we are unable to see that the instruction was improper.

A number of other exceptions are argued. It seems hardly worth while to take space to further discuss the record. Indeed, more space has already been taken than probably the importance of the questions justify. Suffice it to say that we have examined all exceptions and do not find prejudicial error as to any.

It is argued by the defendant in error that the company is liable, under the evidence, wholly irrespective of the question of negligence, because it was keeping and handling a dangerous substance. We do not find it necessary to discuss the question and express no opinion upon it.

Finding no error in the record, the judgments below will be affirmed.

WITNESSES—OPINIONS OF—WHEN ADMISSIBLE—EXPERTS.—A witness who is shown to possess peculiar personal knowledge about the matter under consideration which ordinary persons do not possess may give his opinions in reference thereto: Note to *Enos v. St. Paul etc. Ins. Co.*, 46 Am. St. Rep. 814. To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry: *Laing v. United etc. Canal Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682. Expert testimony is not admissible upon a question which the court or jury can decide upon the facts: Note to *Radam v. Capital etc. Co.*, 26 Am. St. Rep. 793. Expert testimony as to a matter within the common knowledge of the jury is inadmissible: *Alabama etc. R. R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121.

INSTRUCTIONS SHOULD BE CONSIDERED AS A WHOLE, and construed with reference to each other; and if a charge, as a whole, is correct, the judgment will not be reversed, although an extract from the charge, taken by itself, is erroneous: Note to *Fearey v. O'Neill*, 73 Am. St. Rep. 447. See, also, *McNeill v. State*, 102 Ala. 121, 48 Am. St. Rep. 17.

FRATERNAL MYSTIC CIRCLE v. STATE.

[61 OHIO STATE, 628.]

MANDAMUS IS NOT A PROPER REMEDY to enforce the performance of a duty which is not specifically enjoined by law, nor must the writ be issued in a case where there is a plain and adequate remedy in the ordinary course of the law.

MANDAMUS—TO RESTORE TO MEMBERSHIP IN FRATERNAL SOCIETY.—A writ of mandamus will not issue to compel a private corporation, such as the Fraternal Mystic Circle, organized for the mutual protection and relief of its members, to restore to membership therein a person who claims to have been illegally expelled therefrom and to be unlawfully excluded from participation in the advantages of membership in the corporation. Such restoration is not an act specially enjoined by law, and, assuming that the exclusion was wrongful, the member has a plain and adequate remedy in the ordinary course of the law.

An original action was commenced in the circuit court by the relator, Fritter, for a peremptory writ of mandamus to compel the Fraternal Mystic Circle, a corporation organized under the laws of the state for the mutual protection and relief of its members to restore him to membership in the society, from which he claimed to have been illegally expelled. An order was made that the writ be issued, and the society petitioned in error to reverse the judgment.

Merrick & Tompkins and Cyrus Huling, for the plaintiff in error.

Nash & Lentz, Louis G. Addison, and Lincoln Fritter, for the defendant in error.

630 **SHAUCK, J.** Numerous questions are presented by the record and discussed in the briefs of counsel, but enough of the case has been stated to raise the only question which is thought deserving of attention, whether mandamus will lie for the redress of such grievances as are alleged in the petition.

Courts in other states have allowed the writ so frequently in cases quite similar to this that some writers on benefit societies have stated it as a general rule that, if a member is wrongfully expelled from a society, he may be restored by mandamus. We have, however, to determine the question in accordance with the provisions of our own constitution and statutes upon the subject. The legislation upon the subject of mandamus is in chapter 2 of title 4 of the Revised Statutes.

While the procedure with respect to this form of relief has been brought approximately into subjection to the provisions of the Code of Civil Procedure, the writ retains its extraordinary and prerogative character. It may be that the legislature has not attempted to deprive it of that character, because it has regarded itself as without power to do so. The constitution vests original jurisdiction in mandamus in the circuit court and in the supreme court. Through repeated decisions it has ⁶³¹ become well known that the general assembly cannot add to the original jurisdiction of those courts, because the constitutional grant is exclusive. An attempt to enlarge the purposes of the writ so as to make it a substitute for actions at law, and suits in equity would fail as an attempt to accomplish a forbidden purpose by indirection. This may account for the fact that the legislature has not attempted to add to the purposes for which the writ may be resorted to as they were known at the adoption of the constitution. It is doubtless because of the extraordinary character of the remedy that it is prosecuted in the name of the state, and original jurisdiction with respect to it is conferred upon the higher courts which have not original jurisdiction in private actions at law and suits in equity.

That the general assembly may increase the number of cases in which resort may be had to this remedy is not doubted. Indeed, it does so whenever it enacts a law which specially enjoins the performance of an act as a duty resulting from an office, trust, or station. But such laws do not change the character or purpose of the remedy.

Contemporaneously with the adoption of the constitution, the legislature defined mandamus as "a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." This, like the other provisions of the statute, did not change the character of the writ or the purposes for which it may be invoked, but only reduced to the form of a statute the commonly accepted definitions and principles upon the subject. This definition recognizes the public character of the action, and clearly excludes the idea that it may be resorted to for the purpose of enforcing the performance of duties in which the public have no interest. That interest is appropriately manifested by ⁶³² a statute enjoining the particular act

as a duty resulting from an office, trust, or station. "The object of the remedy by mandamus is to compel public officers and private individuals, in matters relating to the public, to perform their public duties": *Tillson v. Commissioners etc.*, 19 Ohio, 415. This is only saying that private actions are appropriate for the redress of private wrongs.

The definition shows with perhaps even more clearness that mandamus is not a preventive remedy. It is essentially a coercive writ. It commands performance, not desistance. The real grievance of the relator is that he is unlawfully excluded from participation in the advantages of membership in the corporation, and the appropriate remedy would be that the corporation desist from such exclusion, or compensate him in damages for the wrong. The inference from the nature of the writ, that its extraordinary character is incompatible with the redress of private wrongs, is in accordance with the express provision of the statute, section 6744: "The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." Assuming that the relator is wrongfully excluded from participation in benefits, he may recover, in an action at law, the damage he has sustained. If that remedy would be inadequate, he would be entitled to an injunction to prevent his further exclusion. Whether his remedy would be at law or in equity, we need not determine here, for in this comparison both of those remedies are in the ordinary course of the law.

Some of the numerous cases cited by counsel for the relator are, in view of the provision quoted, opposed to his position, since they hold that in such case injunction will lie to prevent the exclusion of the members. In some, the writ of mandamus has been allowed without consideration of the propriety of the remedy. None of them offers such reasons for ⁶³³ its allowance as would be entitled to prevail against the objections stated, if it were yet an open question. It is, however, held in *Freon v. Carriage Co.*, 42 Ohio St. 30, 71 Am. Rep. 794, that "mandamus is not the proper remedy to enforce the performance of a duty imposed upon the officers of a private corporation, organized for profit merely, where such duty is not specifically enjoined by law, and where there is a plain and adequate remedy either at law or in equity." The point there authoritatively decided is, according to a familiar rule of this court, stated in the syllabus.

The provisions quoted from the statute, and the case cited, justify the conclusion that the writ should not have been allowed in favor of the relator, because the act whose performance is commanded is not specially enjoined by law, and because the relator, assuming that he has a cause of action, has a plain and adequate remedy in the ordinary course of the law. That conclusion is inferentially supported by numerous other decisions of this court in which the writ has been refused. We find no decision of this court in which the writ has been allowed in cases or upon principles inconsistent with the conclusions stated.

Although both remedies are administered in the same court, it has generally been held that a suit to enjoin cannot be maintained where an action for damages would afford adequate relief. But the distinction in this respect between mandamus and remedies in the ordinary course of the law is obviously of much greater importance, since, by the allowance of the writ of mandamus in forbidden cases, the circuit court and this court would in effect extend their original jurisdiction beyond the constitutional grant upon that subject.

Judgment reversed and original petition dismissed.

Minshall, J., dissents.

MANDAMUS—RESTORATION TO MEMBERSHIP IN FRATERNAL SOCIETY.—The writ of mandamus issues only when there is a clear and specific right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy: *Swift v. Richardson*, 7 *Houst.* 338, 40 *Am. St. Rep.* 127; monographic note to *Dane v. Derby*, 89 *Am. Dec.* 730, on the law of mandamus. That a writ of mandamus may issue to compel an association to restore to membership an expelled member, where the offense of which he was convicted did not justify his expulsion, or where the proceedings were irregular in substantial particulars, see monographic note to *Robinson v. Templar Lodge*, 59 *Am. St. Rep.* 201, 202, on the remedies of members of fraternal and other associations.

CASES
IN THE
SUPREME COURT
OF
OREGON.

ARTHUR v. PALATINE INSURANCE COMPANY.

[35 OREGON, 27.]

INSURANCE—FAILURE TO DISCLOSE LIENS ON PROPERTY.—The failure to inform an insurance company, upon an oral application, of the existence of liens and encumbrances on the property, where no inquiries in reference thereto were made, does not render a policy void under a provision that it shall be void if the insured has concealed or misrepresented any material fact or condition, unless such failure was intentional and with the design to defraud.

INSURANCE—EXISTENCE OF CHATTEL MORTGAGE. Where an insurance policy is issued upon an oral application, without any inquiry on the part of the company as to chattel mortgages upon the property, and without any statement by the assured in reference thereto, and where it does not appear that the assured knew that the company would refuse to take the risk if a mortgage existed, or that it would insert in the policy a clause making it void if such a mortgage existed, the company is deemed by its action to have consented to assume the risk of such mortgage, and to have waived the provision in the policy that it shall be void if the property is so encumbered.

Chamberlain & Thomas and Warren E. Thomas, for the appellant.

Fenton, Bronaugh & Muir and William D. Fenton, for the respondent.

²⁸ BEAN, J. This is an action upon a fire insurance policy issued by the defendant to McGee Brothers, insuring them to the amount of three thousand five hundred dollars on certain buildings, engines, boilers, and other mill machinery at Ballard, in the state of Washington, "loss, if any, payable to J. M. Arthur & Co., Portland, Oregon, as their interest may appear." The

insurance was for one year from the 3d of February, 1895, and the property was destroyed by fire on the 25th of the same month. At the time the insurance was effected McGee Brothers did not own the property covered by the policy, but were in possession thereof under a contract with plaintiffs for its purchase, containing a covenant and condition to the effect that the title should not pass until the purchase price was fully paid, and the further condition that they should keep the property insured, and have the loss, if any, made payable to the plaintiffs as their interest might appear. A portion of the real property was encumbered at the time by sundry mechanics' liens, and the personal property by a chattel mortgage in favor of the plaintiffs, given as collateral to the conditional sale notes held by them. The policy provides that it shall be void "if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or condition concerning the insurance, or the subject thereof," and "unless otherwise provided by agreement indorsed hereon, or added ²⁰ thereto; . . . if the interest of the insured be other than unconditional and sole ownership; . . . or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." For the defendant it is claimed that, under these provisions, the policy is void, because: 1. The liens and encumbrances on the real property were material to the risk, and were concealed from the defendant by the assured at the time of the application for the insurance; 2. That the personal property was encumbered by a chattel mortgage of which the defendant had no knowledge; and 3. That the assured were not the sole and unconditional owners of the property. The questions on this appeal are confined, however, to the first and second defenses, because the jury found—and there was abundant evidence to support the finding—that the defendant was advised and had knowledge of the condition of the title, and of the interest of McGee Brothers in the property, at the time the insurance was effected; and it is not disputed that such knowledge operated as a waiver of the provision in the policy that it should be void "if the interest of the assured be other than unconditional and sole ownership."

1. Upon the first defense, the court charged the jury, in effect, that the failure of the assured to inform the defendant of the liens and encumbrances on the property would not render the policy void, unless it was intentional and with the design to defraud, and this is assigned as error. It is argued

that the failure to inform the company of any facts or circumstances material to the risk would, under the provisions of the policy already quoted, render it void, without regard to the intention or design of the assured. The policy was issued upon an oral application, and the agent of the defendant company who made the contract of insurance, and who was familiar with the property, made no inquiries in reference ³⁰ to liens or encumbrances thereon, and no statements or representations whatever were made in reference thereto by the assured or anyone in their behalf. In such case the intention of the assured becomes of controlling importance, and, in order to avoid the policy, it must appear, not only that the matter concerning which the insurer had no information was material to the risk, but also that it was intentionally and fraudulently concealed by the assured. Where inquiry is made, it is the duty of the assured to disclose the facts relating to the construction, location, situation, condition, and uses of the risk, as well as to its character and value, whether he knows them to be material or not. And it is not a question as to what he supposes or believes in reference to the subject matter of the inquiry, but simply whether, in fact, the matter inquired about is material to the risk, and, if so, any failure on his part to answer the inquiry fully will be fatal to his policy, even though it was not fraudulent or designed. But the mere failure or neglect to make known, without inquiry, facts which the insurer may regard as material to the risk, is not a breach of the provision of the policy above quoted, because the assured has the right to assume that the insurer will make proper inquiry in reference to such matters as it may deem material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to unusual or extraordinary circumstances within the knowledge of the assured, but of which there is nothing to put the insurer upon inquiry: *Koshland v. Hartford Ins. Co.*, 31 Or. 402; 1 May on Insurance, sec. 207; 1 Wood on Insurance, 517; Richards on Insurance, sec. 136; *Sanford v. Royal Ins. Co.*, 11 Wash. 653; *Morrison v. Tennessee Marine Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Guest v. New Hampshire Ins. Co.*, 66 Mich. 98; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 137; ³¹ *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *Continental Ins. Co. v. Munns*, 120 Ind. 30.

2. It is next claimed that the court erred in charging the jury that, if there was no mistake or concealment by the assured in reference to the chattel mortgage, they could not find

the policy void on account of its existence. It is contended that the question of concealment is not material, under the clause providing that the policy shall be void if the subject of the insurance "be or become encumbered by a chattel mortgage," but that the pretended contract of insurance never had any validity, and was void at its inception, on account of such provision and the existence of a chattel mortgage on the property insured. As we have already said, the policy was issued upon an oral application, without any inquiry on the part of the defendant as to liens or other encumbrances upon the property, and without any statement or representation in reference thereto by the assured, and the evidence does not disclose that either the insured or the plaintiffs were informed or knew that, if a mortgage existed, defendant would not take the risk, or that it would insert in the policy which it agreed to issue a clause making it void if the property was so encumbered. Under such circumstances, we take the law to be that the company is deemed by its action to have consented to assume the risk of such liens and encumbrances as may have been upon the property, and to that extent to have modified or suspended the printed terms of the policy, which was prepared for general use, without reference to the particular case. This is the only doctrine consistent with honesty and fair dealing, and is the logical result of *Sproul v. Western Assur. Co.*, 33 Or. 98, and is directly supported by *Wright v. London Fire Assn.*, 12 Mont. 474; ³² *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404; *Hanover Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719; *German Mut. Ins. Co. v. Neiwedde*, 11 Ind. App. 624; *Insurance Co. of North America v. Bachler*, 44 Neb. 549.

After the loss, plaintiffs made and forwarded to the defendant full and complete proof thereof, showing the actual condition of the property, and the liens and encumbrances thereon at the time the insurance was effected; and thereafter a representative of the defendant wrote to the attorneys of the plaintiffs to the effect that the company denied liability, on the ground that McGee Brothers were not the sole and unconditional owners of the insured property. The court below charged the jury that, in view of this letter, the defendant was precluded from making any other defense to the action than the one stated therein, and this ruling is assigned as error. Upon the question thus presented the authorities are in conflict. It is unnecessary, however, for us to consider it at this time, because the error, if any, was harmless. The entire required

dence given on the trial, which is appended to and made a part of the bill of exceptions, shows that there was no fraud or deceit on the part of the insured, or anyone representing them, and that the defendant made its contract of insurance, and issued and delivered its policy, upon an oral application, without making any inquiry in reference to liens or encumbrances upon the property covered thereby; thus waiving the provision avoiding the policy if the property be encumbered by a chattel mortgage, and precluding any defense on account of the provision that it should be void if the insured had concealed or misrepresented any material fact concerning the risk. As the first and second defenses attempted to be made were therefore wholly unsupported by the ³³ testimony, it was no injury to the defendant to withdraw them from the consideration of the jury. It follows that the judgment of the court below must be affirmed and it is so ordered.

INSURANCE—FAILURE TO DISCLOSE MORTGAGE.—If an application for fire insurance is oral, and no inquiries are made as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but his silence is not due to any sinister motive or intention to deceive the insurer, the fact that there exists a mortgage on the insured property does not invalidate the policy, notwithstanding it provides that it shall be void if there exists an encumbrance against the insured property: *Hanover Fire Ins. Co. v. Bohn*, 43 Neb. 743, 58 Am. St. Rep. 719.

TITLE GUARANTEE COMPANY v. WRENN.

[35 OREGON, 62.]

MECHANIC'S LIEN—CONSTITUTIONAL LAW—CONSENT OF OWNER.—A statute providing that every building or other improvement constructed upon land with the knowledge of the owner shall be held to have been constructed at the owner's instance, whose interest shall be subject to a lien, is not unconstitutional as creating a lien upon the land of another without his consent, since the statute simply provides a rule of evidence by which such consent can be determined.

MECHANIC'S LIEN—MEANING OF "OWNER."—Under a statute providing for a lien upon land upon which a building has been constructed "with the knowledge of the owner," the word "owner" refers to the owner of the legal title to the land, and not to the owner of the building.

MECHANIC'S LIEN—STATUTE OF LIMITATIONS—EFFECT OF FILING ANSWER.—Under a statute which provides that suit to enforce a mechanic's lien must be begun within six months,

and that in such a suit all other lienholders shall be made parties, the filing of an answer by a defendant in such a proceeding is as effectual to prevent the bar of the statute of limitations as the beginning of an original suit.

MECHANIC'S LIEN—PLEADING—AVERMENT OF OWNERSHIP.—In a suit to foreclose a mechanic's lien, an answer which sets up a further lien, but does not clearly state the name of the owner or the reputed owner of the building, is sufficient after decree, where the lien notices, which name every person who seems to have had or claimed any interest in the property, or who was an owner or reputed owner, are attached to and made a part of the answer.

MECHANIC'S LIEN — ATTORNEY'S FEE—CONSTITUTIONAL LAW.—A statute providing for a reasonable attorney's fee in a suit to foreclose a mechanic's lien is not unconstitutional as granting unequal privileges to litigants and denying equal protection of the laws, since such a provision is in the nature of costs to be determined by the court.

MECHANIC'S LIEN—EFFECT OF INCLUDING NONLIENABLE ITEMS.—Where the demand of a lien claimant, made in good faith, consists of different items, separately charged, some of which are by law a lien upon the property and others not, he may enforce his lien so far as given by law, and it is not vitiated because by mistake he has included therein nonlienable items.

REAL PROPERTY—MERGER OF ENCUMBRANCE IN THE FEE.—Where the legal ownership of land and the absolute ownership of an encumbrance upon it become vested in the same person, the intention governs the question of merger; and if the owner has an interest in keeping such interests distinct, there will be no merger unless he expressly wishes it.

MECHANIC'S LIEN — PURCHASER AT DISCOUNT — RIGHT TO ENFORCE.—One who purchases a mechanic's lien at a discount is entitled to enforce it for its full face value as against other lienholders toward whom he stands in no fiduciary relation.

MORTGAGES—RENEWAL—PRIORITY.—A renewal note and mortgage made before the filing of intervening mechanics' liens and in ignorance of their existence occupies the same place, so far as priority is concerned, as the original note and mortgage.

Emil Pohl and his mother and sister were the owners of the property in question, subject to a mortgage of twelve hundred and sixty dollars upon an undivided half in favor of Mary E. Rust. Emil Pohl, who was agent of his mother and sister, executed a bond for a deed of the property to Schuck, who assigned to Wrenn, who entered into possession and began the construction of four houses, purchasing the material from the lien claimants, parties to the suit. Wrenn conveyed a part of the property to the plaintiff as security. Inman, Poulsen & Co. commenced this suit to foreclose their lien on the buildings, making all persons interested parties to the suit. The defendant lien claimants filed answers setting up their liens, but no process was issued thereon. Wrenn failed to comply with his contract and assigned to Emil Pohl, who, having acquired

the interest of his mother and sister, sold to Pattullo, who assumed the Rust mortgage which had been renewed a few days before the filing of any of the mechanics' liens claims. Pattullo, through the Title Guarantee and Trust Company, borrowed of the Portland Trust Company five thousand one hundred dollars. The guarantee company issued its title policy to the trust company. To protect itself, the guarantee company purchased the Rust mortgage and all of the mechanics' liens except those claimed by Jackson and four others, involved in the suit, and was substituted for such parties in the suit. Pattullo was substituted as a party in place of the former owners of the property and moved to strike out certain answers on the ground that six months had expired since their liens had been filed, and no suit had been brought to enforce them. This motion was overruled, as was also a demurrer to the same effect. Jackson and others filed amended answers, alleging that the guarantee company acted for Pattullo, and hence the mortgage and liens purchased were merged in the legal title. The guarantee company denied that it had purchased for Pattullo. Upon trial the liens claimed by the guarantee company were sustained as against Pattullo, but denied as against Jackson and the others, who were given first liens upon the property and held entitled to a priority. The guarantee company and Pattullo appeal.

Davis, Gartenbein, & Veazie and Arthur L. Veazie, for the Title Guarantee Company.

Snow & McCamant and Wallace McCamant, for A. S. Pattullo.

George G. Gammans and Robert C. Wright, for Jackson and others, lien claimants.

⁶⁶ BEAN, J. 1. The defendant Pattullo challenges the validity of all the mechanics' liens involved in this suit on the grounds: 1. That section 3672 of the code, under which it is sought to sustain such liens as against him, is unconstitutional and void; 2. That this section, when properly construed, is intended as a provision by which ⁶⁷ property owners otherwise liable to pay mechanics' liens might relieve themselves from such liability; and therefore has no application to a case of this character; and 3. That the evidence fails to show that the buildings in question were constructed with the knowledge of the owners of the property. The section referred to provides

that "every building, or other improvement mentioned in section 3669, constructed upon any lands with the knowledge of the owner . . . shall be held to have been constructed at the instance of such owner," and that his interest shall be subject to any lien filed in accordance with the provisions of the act, unless he "shall, within three days after he shall have obtained knowledge of the construction, . . . give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon." It is claimed that, inasmuch as a lien can only be created upon the land of another by his consent or authority, this section is unconstitutional and void, and the cases of *Randolph v. Builders' Supply Co.*, 106 Ala. 501, and *Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663, are cited in support of this contention; but neither of these cases is in point, because by the statutes which were there held void the fact that the person performing labor or furnishing material was not enjoined by the owner, or notified in writing not to do so, is made conclusive evidence that such labor was performed or material furnished with or by his consent, without reference to his knowledge thereof; while our statute, assuming that a lien cannot be created without the consent of the owner, express or implied, simply provides a rule of evidence by which such consent can be determined. Similar provisions of mechanic's lien laws have been sustained and enforced ⁶⁸ even in the state to whose reports we are referred for counsel's leading authority: See *Wheaton v. Berg*, 50 Minn. 525; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Harlan v. Stufflebeem*, 87 Cal. 508; *Allen v. Rowe*, 19 Or. 188. So that we conclude this section is not open to the constitutional objection urged.

2. Nor do we concur with counsel in the contention that the owner referred to therein is the person who caused the building to be constructed, and not the owner of the legal title. This question was considered and decided against such contention by the supreme court of California in the case of *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, and, we think, rightly so.

It is next claimed that there is no evidence showing that the buildings in question were constructed with the knowledge of Pattullo's predecessors in interest. It is unnecessary for us to refer at length to the testimony upon this question. Let it suffice to say that, in our opinion, it is amply sufficient to sustain the finding of the court below in that regard. Indeed,

it seems quite clear that Emil Pohl had full knowledge of the construction of these buildings, and we think his agency for his mother and sister was of such a character as to bind them by such knowledge, especially since they afterward ratified his acts by executing a deed to enable him to fulfil the conditions of his bond, and their subsequent conveyance of the property to him, in order that he might transfer it to Pattullo.

3. Next it is claimed that certain of the liens sought to be foreclosed in this suit are barred by the statute of limitations, because the answers of the defendants were not served upon the owners of the property. The statute provides (section 3675) that "no lien provided for in this act shall bind any buildings . . . for a longer ⁶⁹ period than six months after the same shall have been filed unless suit be brought within that time to enforce the same." But section 3677, a part of the same act, provides that in a suit to foreclose a mechanic's lien all other lienholders whose claims have been filed shall be made parties, and under this section we take it that a suit to enforce a particular mechanic's lien is, in effect, a proceeding to enforce the liens of all lien claimants, parties to the record, and the filing of an answer by a defendant in such proceeding is as much a compliance with the statute as the beginning of the original suit: *Mars v. McKay*, 14 Cal. 127; *Phillips on Mechanics' Liens*, sec. 333.

4. It is also claimed that the answers of the respondents Jackson and others are insufficient to support the decree because the name of the owner or reputed owner of the property at the time the buildings were being constructed is not stated therein. The allegations of the pleadings do not seem very clear upon this question, but we deem them sufficient after decree. The lien notices, which are attached to and made a part of each of the pleadings, name every person who seems to have had or claimed any interest whatever in the property, or who was an owner or reputed owner; and the allegations of the pleadings setting out these notices are quite full and complete. There is an evident attempt to set out in the answers the names of the owners of the property, and we are not prepared to hold the answers fatally defective on that ground.

The court below, in sustaining the liens of the respondents Jackson and others, allowed two hundred and fifty dollars for attorneys' fees in foreclosing the same, and three hundred and fifty dollars to the attorneys for the Title Guarantee and Trust Company for services in foreclosing its liens. It is claimed by

Pattullo that these amounts are grossly excessive, but the findings of the ⁷⁰ court are amply sustained by the testimony, and we are not disposed to disturb its conclusions.

5. Pattullo also insists that the court erred in allowing any attorney's fee. The statute provides (section 3677) that "in all suits under this act the court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorneys' fees"; and it is contended that this provision of the statute is unconstitutional and void, because it grants to one litigant a privilege not granted to the other, and therefore denies the owner in a suit of this character equal protection of the laws. There are many cases holding that the legislature cannot make unjust distinctions between suitors without violating the spirit or letter of the constitution. But it will be observed that the attorneys' fees provided for in the mechanic's lien act are not fixed and determined by the act, nor imposed strictly as a penalty, but rather in the nature of costs, of which the amount is to be determined by the court; and it is therefore, in our opinion, not obnoxious to the constitution: See *Griffith v. Maxwell*, 19 Wash. 614; *Wortman v. Kleinschmidt*, 12 Mont. 316, 330; *Jewell v. McKay*, 82 Cal. 144, 152; *Helena etc. Supply Co. v. Wells*, 16 Mont. 65, 69.

It is next claimed that the Jackson lien is invalid because the materials were not furnished for the four buildings indiscriminately under an entire contract, but under an agreement to furnish certain specified material for each building, and for a price fixed and agreed upon. But this contention is not sustained by the testimony. Jackson himself is the only witness who seems to have testified upon the subject, and his evidence is to the effect that the materials were furnished under one entire contract ⁷¹ for all four buildings indiscriminately. The manner in which he arrived at the contract price is immaterial.

6. It is next claimed that the Inman, Poulsen & Co. lien is invalid, because among the items going to make up the amount thereof is a small item for material furnished and used in the construction of a fence around the property upon which the building sought to be affected by the lien is situated. Upon this question the evidence shows that the material was furnished from time to time, as ordered by the persons in charge of the construction of the buildings, at the ordinary and customary price for each separate article; and under these cir-

cumstances the fact that the claim filed included by mistake an item not lienable does not invalidate the lien. This question has been considered in *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, and *Allen v. Elwert*, 29 Or. 428, and the rule announced in the last case cited is that: "Where lienable and nonlienable items are included in one contract for a specific sum, or are made the basis of a lumping charge, so that it cannot be perceived from the contract or account what proportion is chargeable to each, the benefit of the mechanic's lien law is lost. In such cases the court cannot, by extrinsic evidence, apportion the amount of the entire charge or contract price between the lienable and nonlienable items. But where the claimant's demand, made in good faith, consists of several different items, separately charged, some of which are by law a lien upon the property, and others do not come within the scope of the statute, he may enforce his lien so far as given by law, and it is not vitiated because he has included therein nonlienable items." Within this rule it is apparent ⁷² that the lien of *Inman, Poulsen & Co.* is not vitiated because by mistake they included therein certain material for which they were not entitled to a lien. At the time the claim of lien was verified the claimants honestly believed that all the material furnished by them had actually been used in the construction of the buildings. It turns out by the evidence, however, that without any negligence or willfulness on their part they had made a mistake, and included fifteen dollars and forty cents' worth of material which they did not intend to include, and for which they were not entitled to a lien. There is a clear distinction to be made between such a state of facts and a case where the notice of the lien included in one lump charge lienable and nonlienable materials.

7. This brings us to the question in controversy between the Title Guarantee and Trust Company and the respondents Jackson and others. On behalf of the latter, it is contended that all the mechanics' liens acquired by the guarantee company, as well as the Rust mortgage, were purchased by it as the agent and representative of Pattullo, and with his money, and consequently were merged in the legal title, and extinguished as against these respondents. But we do not think this contention is sustained by the record. The manager of the guarantee company and Pattullo both testified that the liens were purchased by the company with its own money, on its own

behalf, and not as the agent of Pattullo. But, however this may be, it is indisputable that it was the intention of the parties to preserve all these liens intact as against the respondents, and to proceed with the suit then pending for their foreclosure; and under these circumstances a court of equity will not suffer them to merge into the legal title, and be extinguished. Merger, in equity, takes place when the owner of the fee becomes entitled in his own right to a charge or encumbrance on ⁷³ the land, and no intention to prevent it has been expressed, and none is implied from the circumstances and interests of the party: 2 Pomeroy's Equity Jurisprudence, sec. 790. And where the legal ownership of the land and absolute ownership of the encumbrance become vested in the same person, the intention, as a general rule, governs the question of merger. Pomeroy says: "The question is upon the intention, actual or presumed, of the person in whom the interests are united. Sir George Jessel says: 'In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. . . . If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; but, if there is any reason for keeping it alive—such as the existence of another encumbrance—equity will not destroy it.' In short, where the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, the intention governs the merger in equity. If this intention has been expressed, it controls. In the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party, as shown by all the circumstances. If his interests require the encumbrance to be kept alive, his intention to do so will be inferred and followed. If, on the contrary, his best interests are not opposed to a merger, then a merger will take place, according to his supposed intention": 2 Pomeroy's Equity Jurisprudence, sec. 791. And, as said in *Watson v. Dundee Mortgage etc. Co.*, 12 Or. 483: "In equity, mergers are considered odious, and are much less favored than at law, and are made to depend upon the intention and interest of the party. It is only in those cases where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist that in ⁷⁴ equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger." Within this rule it is clear

that the mechanics' liens sold and assigned to the Title Guarantee and Trust Company did not merge in the legal title, even if it was acting as the agent of Pattullo, because there was an evident intention to keep them alive; and for the further reason that a merger would be against the interests of Pattullo, and therefore inequitable and unjust.

8. It appears from the testimony that the guarantee company purchased the mechanics' liens now claimed by it for very much less than their face, and it is insisted by the respondents Jackson and others that in some way they ought to be entitled to the benefit of such discount; or, in other words, that the company ought not to be permitted to enforce the liens for any other or greater amount than the cost thereof. But upon what ground this contention is to be sustained we are at a loss to understand. There was certainly no fiduciary relation between the company and Jackson and others which would entitle the latter to the benefit of any discount which the company may have received in the purchase of these liens, and, so far as they are concerned, it is a matter of no consequence whether the liens are enforced in the name of the Title Guarantee and Trust Company or in the name of the original parties. The result would be the same. In either event, they will simply share pro rata with the other lien claimants in the common fund.

9. Nor is there any merit in the contention that the several mechanics' liens take precedence over the Rust mortgage on account of the renewal thereof. It appears from the testimony that before any of the liens in question had been filed the note and mortgage were renewed ⁷⁵ in ignorance of any intervening liens or right to a lien, and within the doctrine of *Pearce v. Buell*, 22 Or. 29, *Kern v. Hotaling*, 27 Or. 205, 50 Am. St. Rep. 710, and *Capital Lumbering Co. v. Ryan*, 34 Or. 73, the new mortgage will occupy the same place, so far as the priorities are concerned, as the one it superseded. This, we believe, disposes of all the questions presented by this complicated record, and results in a modification of the decree of the court below, and a decree will be entered here in accordance with this opinion.

THE CONSTITUTIONALITY OF A MECHANIC'S LIEN LAW, similar to the one upheld in the principal case, seems to be assumed in *Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83. See, too, the extended note to *Loonie v. Hogan*, 61 Am. Dec. 700.

MECHANIC'S LIEN—NONLIENABLE ITEMS.—It is said in *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, that where a claimant's demand, made in good faith, consists in several different items

separately charged, some of which are by law a lien upon the property, and others are not within the scope of the statute, he may enforce his lien so far as is given by law, and it is not vitiated because he has included therein nonlienable items. On lumping charges in liens, see *Mitchell etc. Co. v. Allison*, 138 Mo. 50, 60 Am. St. Rep. 544; *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835.

MECHANIC'S LIEN—PLEADING.—Although a complaint for the foreclosure of a mechanic's lien must show affirmatively that the lien notice contained all the statutory requirements, the statute is sufficiently complied with if a copy of the notice is set out in the complaint, or is made a part thereof as an exhibit: *Matthiesen v. Arata*, 32 Or. 342, 67 Am. St. Rep. 535. And under proper allegations to enforce a mechanic's lien, an imperfect description of the property in the lien may be aided by extrinsic evidence: *Coburn v. Stephens*, 137 Ind. 683, 45 Am. St. Rep. 218.

MECHANIC'S LIEN—ATTORNEY'S FEE.—In *Forbes v. Willamette etc. Co.*, 19 Or. 61, 20 Am. St. Rep. 793, under a statute allowing the court to tax an attorney's fee in favor of a claimant foreclosing a mechanic's lien, a fee was allowed, and the constitutionality of the statute passed unquestioned.

PRIORITY BETWEEN MECHANICS' LIENS AND MORTGAGES is discussed in the extended note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 422-425. A new mortgage is a renewal of the old one to the extent of the original debt, and takes precedence over a lien of judgment obtained after the old mortgage was given and before the new one was executed: *Young v. Shaner*, 73 Iowa, 555, 5 Am. St. Rep. 701.

MERGER OF ESTATES.—The union of the legal and equitable estate in the same person does not necessarily effect the merger of the latter, where the interest of the parties or the equitable rights of third persons require them to be kept distinct: See the extended note to *Speed v. Hann*, 15 Am. Dec. 83. The union of legal and equitable estates, so as to give priority to the liens on the latter, never takes place against the intention of the parties where that intention is manifested: *Campbell's Appeal*, 36 Pa. St. 247, 78 Am. Dec. 375.

SIGLIN *v.* COOS BAY COMPANY.

[35 OREGON, 79.]

REAL PROPERTY—FENCES—PROOF OF OWNERSHIP.—

In an action for damages to stock by coming in contact with a barbed wire fence, the ownership of the fence may be proved by parol.

EVIDENCE—ACTS OF OWNERSHIP AFTER AN ACCIDENT.—Where the plaintiff's evidence raises a disputable presumption that the defendant was the owner of a barbed wire fence prior to an injury caused thereby, the admission of evidence tending to show that after the injury the defendant continued to exercise acts of ownership is harmless.

NEGLIGENCE—DEFECTIVE FENCE—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.—A railroad company neglecting to keep a barbed wire fence in repair, as required by statute, is liable to the owner of adjoining lands for injury, caused by such defective

fence, to his horses which he had turned out into the highway to graze, and the plaintiff is not guilty of contributory negligence, although at the time he turned his horses loose he knew the character and condition of the defendant's fence.

Joseph W. Bennett, for the appellant.

D. L. Watson, James Watson, and D. L. Watson, Jr., for the respondent.

⁸⁰ MOORE, J. This is an action to recover the value of a horse which plaintiff was compelled to kill in consequence of its being injured by coming in contact with a barbed wire fence constructed and maintained by defendant along the line of the right of way of its railroad. It is alleged in the complaint that the defendant constructed and maintained a fence at the place where the horse was injured, composed of four barbed wires, having no board or pole thereon; that the posts upon which the wires were strung were placed so far apart that the wires sagged nearly to the ground, so that a horse coming in contact therewith would become entangled and thrown down; and that, owing to such faulty construction, it became and was dangerous, of which defendant had knowledge; that, in consequence of defendant's negligence in constructing its fence without a board or a pole thereon, and in knowingly maintaining it in a dangerous condition, plaintiff sustained damage, by the means and in the manner aforesaid, in the sum of seventy-five dollars, the value of the horse. The defendant denied the material allegations of the complaint, and averred that plaintiff was guilty of contributory negligence in unlawfully permitting his horse to run at large on premises not in his possession. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a judgment for plaintiff in the sum of fifty-six dollars and twenty-five cents, and defendant appeals.

1. It is contended that the court erred in admitting oral proof tending to show that defendant was the owner of the fence by which the horse was injured. The plaintiff, appearing as a witness in his own behalf, was permitted to answer, over the defendant's objection and exception, the following question, "Who was the owner ⁸¹ of that fence?" by saying, "The Coos Bay, Roseburg & Eastern Railroad and Navigation Company own it." It is argued that, the fence being a part of the realty upon which it was built, its ownership could not be proved in this manner. True, a fence is generally considered

to be a part of the realty upon which it is built, but it is not universally so: 7 Am. & Eng. Ency. of Law, 1st ed., 905. "When one," says Mr. Ewell in his work on Fixtures, page 60, "builds a house or fence, or places any other erection upon the land of another with his permission, with the intention that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn." If the principle contended for by defendant's counsel be true, then it follows that a railroad company could escape all liability for damages that might result from maintaining a fence composed of barbed wires, having no board or pole thereon, if such fence were placed beyond the limits of its right of way; and, if the ownership of the fence is to be conclusively established by proof of the ownership of the realty upon which it is built, then it also follows that the person upon whose land such a fence might be built by a railroad company would be liable to the owner of any stock that should be killed or injured thereby, for it is the owner of the fence built with barbed wires, without a board or pole thereon, whom the statute makes liable in such cases: Hill's Annotated Laws, sec. 3461. If the fence had been built within the limits of the right of way by the owner of the land through which the railroad was constructed, a certified ⁸² copy of defendant's right of way deed, supplemented by testimony to the effect that the fence was constructed within the limits of the premises or easement granted, would make out a prima facie case against it; but such evidence would not be conclusive, and parol proof would undoubtedly be admissible to show who was the real owner of the fence: Brown v. Bridges, 31 Iowa, 138. No error, in our judgment, was committed by the admission of this testimony.

2. Plaintiff having testified that defendant built the fence, and that he had seen its employes repairing it, was permitted to answer, over defendant's objection and exception, the following question, "State whether, since the accident, you have seen them exercising ownership over the fence," by saying, "After the horse was injured, some men repaired the fence. The same men were the section crew, and worked on the railroad, and also worked on repairing fences wherever there was any posts or anything out along the fence. The sectionmen would put in the posts, and sometimes I have seen them nail up the wires to the posts, or logs, or trees, whatever happened to be in line." It is contended that the court erred in admitting this testimony. But, evidence having been received

tending to show that defendant, prior to the injury, built the fence and kept it in repair, these acts of ownership over the property raised a disputable presumption that it was the owner thereof: Hill's Annotated Laws, sec. 776, subd. 12; and, this being so, no substantial injury could have resulted from the admission of evidence tending to show that, after the injury, defendant continued to exercise acts of ownership over the fence.

3. It is contended that the evidence conclusively shows that plaintiff was guilty of such contributory negligence in permitting his horse to become entangled in the fence as to preclude a recovery for the injury sustained ⁸³ and hence the court erred in refusing to grant a judgment of nonsuit. The substance of plaintiff's testimony is to the effect that, on the day the injury occurred, he was engaged in hauling hay on a sled with his horses in the county road across certain premises of which he was in possession; that his team, having been frightened by a passing train, suddenly turned aside, breaking the sled; that he thereupon unhitched the horses, fastened the tugs to the hames, and turned them loose, with their bridles on, to graze in the county road, while he repaired the sled; that the horses, turning from the highway, went along a path through the brush, about two rods, to the barbed wire fence, in which one of them became entangled, and sustained the injury complained of; that this horse had been theretofore caught in the wires of said fence at a point about fifty yards from where the injury occurred; and that plaintiff, at the time he turned the horses loose, knew the character and condition of the defendant's fence. In *Cressey v. Northern R. R. Co.*, 59 N. H. 564, 47 Am. Rep. 227, it is held that railroad companies neglecting to fence their tracks are liable to the owner of adjoining lands for injury to his cattle on the track, although he turned them out to graze, knowing of that neglect. Mr. Justice Stanley, in rendering the decision, says: "The plaintiff's mare was grazing upon his land. It is not material that it was on land in which the public had an easement, since her grazing did not interfere with the public rights, and, subject to these rights, the plaintiff was entitled to the use of the land within the limits of the highway as fully as to the use of any land he owned." Further in the opinion it is said: "As we have seen, the plaintiff's rights in the highway were the same as in any other land owned by him, except so far as they were modified by the public rights; and in such cases neither ⁸⁴ his rights nor the defendants' liabilities are affected by the plaintiff's want

of ordinary care. If the plaintiff had the right to turn his mare into the highway to feed, due care was not required of him to prevent her escape to the defendants' track. The fact that they had neglected to fence their roadway, and the plaintiff's knowledge of that fact, did not deprive him of the rightful use of his land. The defendants' neglect did not impose upon the plaintiff any obligation, or put him under any disability, with respect to the reasonable enjoyment of his property. The defendants electing to use their road without complying with the law which required them to fence it, they assumed the risk of the accident which happened in this case as a consequence of their neglect."

In *McCoy v. California Pac. R. R. Co.*, 40 Cal. 532, 6 Am. Dec. 623, it is held that, where plaintiff's horses and mules were running in his field, through which defendants' railroad passed, and upon which they strayed, and were injured, the owner of the stock was not guilty of contributory negligence from the fact that he knew the road was not fenced when he turned his stock in the field. In *Wilder v. Maine Cent. R. R. Co.*, 65 Me. 332, 20 Am. Rep. 698, an action having been brought to recover the value of a horse killed by a locomotive on defendants' railroad, which passed through plaintiff's land, it was held that he was not guilty of contributory negligence in turning the horse upon such land, knowing the track was not fenced, when it was the legal duty of the railroad company to build the fence. In *Congdon v. Central Vt. R. R. Co.*, 56 Vt. 390, 48 Am. Rep. 793, it is held that a railroad company neglecting to maintain a proper fence is liable to the owner of adjoining lands for his horse, escaping through a defect in the fence, and killed by a train, although the owner knew of the defect, and that the horse was breachy, and there was no negligence ⁸⁵ in running the train. The plaintiff, being in possession of the land through which the railroad and county road passed, possessed the right to turn his horses on the latter road to graze, so long as he did not interfere with the right of the public therein; and his knowledge of the character and condition of the barbed wire fence does not render him guilty of such contributory negligence as to preclude his right of recovery; for, as was said by Mr. Justice Cooley in *Flint etc. R. R. Co. v. Lull*, 28 Mich. 510: "Indeed, if contributory negligence could constitute a defense, the purpose of the statute might be, in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would

render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that, if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the plaintiff negligent." The notice of appeal assigns other alleged errors, but we do not deem them of sufficient importance to merit consideration, and hence it follows that the judgment is affirmed.

DEFECTIVE FENCES—LIABILITY FOR.—One who negligently constructs and knowingly maintains a barbed wire fence in a dangerous condition, between his land and the highway, is liable for an injury thereby occasioned to domestic animals lawfully running at large: *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213. On the liability for injuries arising from defective partition fences, see the note to *Lowe v. Guard*, 54 Am. St. Rep. 513-515. On the liability of railroads as to fencing their tracks, see the extended note to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 261-273.

ALTMAN v. SCHOOL DISTRICT.

[85 OREGON, 85.]

A JUDGMENT CANNOT BE COLLATERALLY ATTACKED on the ground that the facts stated in the complaint do not constitute a cause of action.

JUDGMENT—COLLATERAL ATTACK.—A judgment is not subject to collateral attack because it was entered within the time allowed by law for the defendant to plead.

Ira Jones and Frank M. Mulkey, for the appellant.

McGinn & Simon and Nathan D. Simon, for the respondent.

⁸⁶ **BEAN, J.** This is a mandamus proceeding to compel the directors of the defendant school district to draw their warrant on the clerk in payment of a judgment recovered by the plaintiff against the district in the circuit court of Multnomah county. The alternative writ, after alleging the corporate capacity of the district and the official character of the several individual defendants, avers, in substance, that on May 1, 1894, the defendant district became indebted to the plaintiff in the sum of one hundred dollars for services as teacher; that on January 2, 1895, he duly and regularly recovered judgment against it for such sum and interest, to-

gether with costs, amounting to twenty-six dollars and fifty cents; that such judgment has not been set aside, reversed, or modified, and is now in all respects a valid and subsisting judgment; that on June 20, 1895, the plaintiff, after having acknowledged satisfaction thereof, presented to the defendant directors a certified copy of such judgment, together with a memorandum of the acknowledgment of satisfaction and the entry thereof, and requested that they draw their warrant in payment ⁸⁷ of the same, but they refused to do so, although there was, at the time, in the treasury of such district, ample funds for that purpose. The defendants, after their demurrer to the alternative writ had been overruled, answered, denying the indebtedness upon which the judgment in question was based, and the validity of such judgment. For a further and separate defense, they set out a copy of the complaint and return of service on the summons in the action brought against the district by the plaintiff, and alleged that the judgment rendered therein is void because the complaint does not state facts sufficient to constitute a cause of action, and because the return of service is false. Upon motion of the plaintiff, the new matter in the answer was stricken out, and, defendants declining to amend or plead further, judgment was rendered against them as demanded. From this judgment they appeal, and insist that the court was in error in striking out such new matter.

The complaint on which the judgment upon which this proceeding is based was rendered alleged that during the spring of 1893 the plaintiff was employed by the defendant district as a teacher for the term of nine months; that in pursuance of such employment, he taught school therein until March 24, 1894, at which time it was mutually agreed between him and the district that he should retire from his position as teacher, and relinquish his claim for the balance of his salary, upon payment to him of one hundred dollars; that he complied with the terms of such contract on his part, but the defendant district, although duly requested, failed and neglected to pay the one hundred dollars, or any part thereof.

1. The objections now urged to such complaint are that the cause of action set out therein was for unearned wages, and that it failed to allege that the plaintiff, at the time he was employed, had a valid certificate authorizing ⁸⁸ him to teach in the common schools of the state. But neither of these objections is available at this time. This is an attempt to im-

peach the judgment collaterally. It was rendered by a court having general jurisdiction over the subject matter, and the power to grant the relief contained in the judgment. And the facts set up in the complaint, however imperfectly stated, were sufficient to authorize it to proceed to hear and determine the matter. It may be conceded, for the purpose of this decision, that if these objections had been made at the proper time they would have been sustained: *Ryan v. School Dist.*, 27 Minn. 433; but the failure to make them left the court with authority to proceed to judgment. In doing so, it necessarily determined that the complaint stated a cause of action, and its decision therein cannot be questioned or impugned collaterally, even though it may be erroneous: 1 *Freeman on Judgments*, secs. 116-118; *Berry v. King*, 15 Or. 165; *Crabill v. Crabill*, 22 Or. 588.

2. It is also sought to impeach the judgment on the ground that the sheriff's return on the summons is false, in that the service was in fact made by him in Clackamas, and not in Multnomah, county, as he certified. It is believed that in a collateral proceeding the return of the officer is conclusive upon that point, but whether it is or not is immaterial, for the record shows that the defendant school district is situate in both Multnomah and Clackamas counties, and therefore the service of process upon its clerk in either county would be valid; and the fact that it was not given all the time allowed by law after the service of the summons in which to plead will not vitiate the judgment or make it subject to collateral attack: *Woodward v. Baker*, 10 Or. 491. It follows that the judgment must be affirmed, and it is so ordered.

A JUDGMENT CANNOT BE COLLATERALLY ATTACKED because of a defective complaint in the action in which it was rendered: *In re James*, 99 Cal. 374, 37 Am. St. Rep. 60; *North Pacific Cycle Co. v. Thomas*, 26 Or. 381, 46 Am. St. Rep. 636. A judgment rendered before the time allowed a defendant to answer has expired is erroneous merely, and can be attacked only upon motion or by appeal: *Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146. Collateral attack upon judgments is the subject of the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119.

BECK v. THOMPSON.

[35 OREGON, 182.]

APPEAL—NOTICE OF.—A notice of appeal which falls to state the amount of the judgment, and misstates the date on which it was rendered, is insufficient.

J. H. Raley, for the appellant.

L. Kearney and Peter West, for the respondent.

¹⁸³ MOORE, J. This action was originally tried in a justice's court of Umatilla county, and a judgment rendered against defendant for the sum of fifty-three dollars, and disbursements taxed at twenty dollars and thirty-five cents. From this judgment defendant attempted to appeal by serving a notice, which, omitting the title of the cause and the names of the parties, is as follows: "You will please take notice that the defendant in the above-entitled case appeals to the circuit court of the state of Oregon for the county of Umatilla, from the judgment rendered in the above-entitled action in the said justice's court of South Pendleton district, on the twelfth day of March, 1896, against the said J. C. Thompson, Sr., defendant, and from the whole of said judgment." The transcript having been sent up by the justice of the peace within the time prescribed by law, the circuit court, considering said notice insufficient to confer jurisdiction, dismissed the appeal, from which latter judgment the defendant appeals to this court. The notice above quoted fails to mention any sum of money as having been recovered by plaintiff, and misstates the day on which the judgment was rendered, as shown by the transcript, and the original undertaking on appeal gives the date of the justice's judgment the same as in the notice. In *Hamilton v. Butler*, 33 Or. 370, judgment was rendered against the defendants on February 4, 1898, by consideration of the county court of Baker county, for the sum of one hundred and ninety-one dollars, and costs and disbursements taxed at eighteen dollars and sixty cents. From this judgment they attempted to appeal by serving a notice which did not allude to the amount recovered, and described ¹⁸⁴ a judgment as having been rendered February 5, 1898. The circuit court dismissed the appeal, and it was held that no error was committed thereby, this court saying: "If it be conceded that the date of the supposed judgment, as given in the notice, is a clerical misprision—a matter which we are unable

to determine from the record, as the date in the undertaking on appeal corresponds with it, while that contained in the transcript of judgment shows it to have been rendered a day earlier—yet within the case of Crawford v. Wist, 26 Or. 596, the notice is otherwise clearly insufficient, and that case is decisive of the present controversy.” In the case at bar, no date or amount is mentioned in the notice of appeal, by which the judgment specified in the transcript can be identified, and under the rule announced in State v. Hanlon, 32 Or. 95, the said notice was insufficient to confer upon the circuit court jurisdiction of the cause, and hence it follows that the judgment is affirmed.

APPEAL, NOTICE OF.—A mistake in the notice of an appeal, whereby the judgment is described as entered on the day when it was rendered, instead of the day when entered, does not entitle the respondent to a dismissal of the appeal: *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34.

VAN SANTVOORD v. ROETHLER.

[35 OREGON, 250.]

LIMITATION OF ACTIONS—FOREIGN JUDGMENTS.—A STATUTE eliminating the time that a defendant is out of the state in computing the statutory period of limitation has no application in an action upon a foreign judgment, where the defendant was a nonresident of the state at the time the action accrued.

JUDGMENTS, FOREIGN—STATUTE OF LIMITATIONS.—Where a cause of action upon a foreign judgment accrues against a nonresident, who subsequently becomes a resident, a state statute of limitations commences to run against such cause of action from the time it accrued in the other state, and the statute will bar such action, even though the judgment is still in full force in the state where it was rendered.

J. B. Messick and William H. Packwood, Jr., for the appellants.

Smith & Heilner and Joseph J. Heilner, for the respondent.

250 WOLVERTON, C. J. This is an action upon a judgment of a sister state. The complaint recites, in brief, that the plaintiffs are receivers of the Walter A. Wood Mowing and Reaping Machine Company, a corporation; that on the fourth day of March, 1886, in the district court for Brule county, Dakota Territory, the said company recovered a judgment

against the defendant for the sum of two hundred and seventy-two dollars and ten cents, which was duly docketed on the nineteenth day of March, 1886; that on the fourteenth day of December, 1889, an execution was issued thereon, and thereafter returned nulla bona; ²⁵¹ that it is now a good, valid, and subsisting judgment of the state of South Dakota, and at all times since its rendition was and now is in full force and effect; that plaintiffs are informed and believe, and therefore allege, that the defendant left the state of South Dakota during the year 1890, returning to the state of Oregon in said year, and that he then and there, and at such time, acquired a residence therein, and about 1891 removed and departed therefrom and lost his residence therein, and resided elsewhere, for a period of about three years, but thereafter returned to the said state of Oregon, and has ever since resided within its borders; that defendant was out of, and absent from, this state at the time of the rendition of said judgment, and did not come or return thereto until less than ten years prior to the commencement of this action; that at no time prior to June 29, 1897, had defendant any real or personal property within the state of Oregon upon which the plaintiffs, or either of them, could secure the necessary lien to enable them to bring an action against him while a nonresident. A general demurrer was interposed to the complaint on the grounds: 1. That it does not state facts sufficient to constitute a cause of action; and 2. That the action has not been commenced within the time limited by law. The demurrer was sustained, and judgment having been entered dismissing the complaint, plaintiffs appeal.

The sole question we are called on to consider is whether the statute of limitations has run against the action. More than ten years have elapsed since the judgment which is the foundation of the action was rendered in Dakota. The plaintiffs seek to bring themselves within the exception created by section 16 of Hill's Annotated Laws, eliminating the time that the defendant was out of this state in a computation of the statutory period of limitation. It may be inferred from the complaint, ²⁵² however, that the defendant was a nonresident of the state at the time the action accrued. Such being the case, *McCormick v. Blanchard*, 7 Or. 232, and *Crane v. Jones*, 24 Or. 419, are decisive of the controversy. The appellants question the soundness of these cases, and, while we might be disposed to agree with them were it a matter of first impression,

we are now bound by the rule of stare decisis. If the practice is to be changed after it has been in vogue for so long a time, it should be by the legislature rather than by the courts. It is urged, as the judgment sued on was in full force in Dakota when the action was commenced here, and being a judgment of a sister state, that the consideration of section 26 of Hill's Annotated Laws should be eliminated in construing the provisions of section 16, touching the statute of limitations. But it is not apparent how this could affect the question. It is quite possible to obtain a judgment in a sister state against a resident of this state, and the statute of limitations, as construed by the cases above cited, would therefore have like application where the action is upon a judgment of a sister state as upon a simple contract. It is the statute of limitations of the forum which controls, unless, as between nonresidents, the statute of the state, territory, or country where the cause arose is set up within the purview of said section 26, and the fact that the judgment is in full force where rendered does not change the issue: 2 Black on Judgments, sec. 892. These considerations affirm the judgment of the court below, and it is so ordered.

A STATUTE OF LIMITATIONS PROVIDING THAT THE TEMPORARY ABSENCE of a defendant from the state shall not be taken as a part of the time limited does not apply to persons who were nonresidents of the state at the time the cause of action accrued: *Huff v. Crawford*, 88 Tex. 368, 53 Am. St. Rep. 763.

THE STATUTE OF LIMITATIONS OF THE FORUM must govern; hence a cause of action, not barred where it arose, may be barred by the law where it is sought to be enforced: See the extended note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878.

SCHNEIDER v. HUTCHINSON.

[35 OREGON, 253.]

JUDGMENT — OPENING DEFAULT — DISCRETION.—The vacation of a judgment by default, which was entered upon striking out a demurrer to the complaint for a technical defect, is a matter resting within the sound discretion of the court, and will not be disturbed upon appeal except for a manifest abuse of discretion.

ADVERSE POSSESSION AGAINST THE STATE.—Under a statute which makes applicable to the state a provision that no action shall be maintained for the recovery of real property unless the plaintiff or his grantor was seised or possessed thereof within ten years before the commencement of the action, the state may be

disseised of lands by adverse possession the same as an individual. Hence the holding of state lands for the statutory period will bar an action by the state and confer good title upon the holder.

ADVERSE POSSESSION OF STATE LANDS—ACTION—SCHOOL LAND COMMISSIONERS.—One who has acquired title to state lands by adverse possession cannot be deprived of his rights, without notice and without an opportunity to be heard, by the action of a board of school land commissioners in issuing and delivering to a purchaser a deed to such lands.

PUBLIC LANDS.—THE GRANT BY CONGRESS of lands to a state "for the use of schools" is an absolute grant, and not a grant upon a condition subsequent.

Woodward & Palmer and Clinton C. Palmer, for the appellant.

Thomas H. Crawford, for the respondent.

²⁵³ BEAN, J. This action was commenced on May 12, 1898, to recover possession of certain land in Union county, being a part of the grant to the state by the act of Congress of February 4, 1859, for the use of schools, and commonly known as "school lands." A demurrer to the complaint having been stricken from the files because of a failure ²⁵⁴ to comply with some rule of the court in reference to its service, judgment was entered for the plaintiff. But the same day, on a showing satisfactory to the trial court, the judgment was set aside, and the defendant permitted to answer, which he did, denying plaintiff's title, and setting up title in himself by adverse possession. The cause was tried without the intervention of a jury; and from the findings of fact it appears that in 1874 Minch and Robinson sold and conveyed the property in question to one John Miller, who immediately went into possession, and he and his successors in interest, including the defendant, have been in the continuous, open, exclusive, and adverse possession thereof ever since, claiming title thereto. On the 19th of August, 1897, while the land was so occupied and claimed by the defendant, the board of commissioners for the sale of school lands sold and conveyed the same to the plaintiff's grantor. Upon these facts the court held that the action was barred by the statute of limitations, and entered judgment accordingly, from which the plaintiff appeals, claiming that the court erred in setting aside defendant's default and permitting him to answer, and in ruling that the statute of limitations ran against the state while it had the title to the land in controversy. But, in our opinion, neither of these positions is sound.

1. The vacation of the judgment, under the circumstances referred to, was a matter resting within the sound discretion of the trial court, and its decision will not be disturbed on appeal, unless for a manifest abuse, which does not appear in this case.

2. The law is well settled that the statute of limitations cannot be set up as a bar to any right or claim of the state, without its permission: 1 Wood on Limitations, sec. 52; Buswell on Limitations, sec. 98. But our statute (Hill's Annotated Laws) is expressly made applicable to actions for the recovery ²⁵⁵ of real property, brought in the name of the state, the same as to actions by private parties. Section 4 provides that such actions shall only be commenced within ten years after the cause of action shall have accrued, "and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within ten years before the commencement of said action"; and by section 13 it is provided that this limitation "shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties." It would seem that the language of the statute is so plain and unambiguous upon this question as to leave no room for controversy as to its proper interpretation, but counsel for the plaintiff claims that a distinction is made between seisin and possession of real property; and he argues that the state became seised of the school lands by act of Congress, and cannot be disseised except by grant, and therefore the statute will not run against the state, although the lands may in fact be in the adverse possession of another. But "seisin," as used in the statute, as well as the common law, signifies possession; and, according to modern authorities, there is no legal difference in the meaning of the two words: 3 Washburn on Real Property, sec. 485; Jacob's Law Dictionary, tit. "Seisin"; 21 Am. & Eng. Ency. of Law, 1st ed., 1057; Ford v. Garner, 49 Ala. 601; 5 Century Dictionary. It is true, it is sometimes said that the state, because of its ubiquity, cannot be disseised of its property, and so cannot maintain an action of trespass to try the title to land, or an action of ejectment: 3 Washburn on Real Property, *525; Decker v. Bryant, 7 Barb. 189; State v. Arledge, 1 Bail. 551. But this is only a reason given by the authorities why the statute of limitations ²⁵⁶ should not apply to actions brought by a sovereign

power, unless expressly provided, and can have no force where the state has voluntarily subjected itself to its provisions. In the latter case the same rule as to ouster and possession will obtain where the state is the paramount owner of the land as that which exists in the case of a private person. In either case the seisin or possession will follow the title, where there is no actual adverse holding; but such a holding for the statutory period will bar an action by the state, the same as an action by a private person: *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *People v. Van Rensselaer*, 8 Barb. 201; *People v. Clarke*, 10 Barb. 144; *People v. Rector etc. of Trinity Church*, 22 N. Y. 44; *Wyatt v. Tisdale*, 97 Ala. 594; *Price v. Jackson*, 91 N. C. 14; *Nichols v. Boston*, 98 Mass. 40, 93 Am. Dec. 132; *Attorney General v. Revere Copper Co.*, 152 Mass. 447.

A distinction is sometimes made, or sought to be made, in this regard, between actions brought by the state in its sovereign and in its proprietary capacity, and the authorities show much diversity in the decisions and reasoning upon this subject. But this distinction is generally suggested in the discussion of the question as to when and in what cases, if any, the statute of limitations will apply to actions brought by the state, when it is not expressly made applicable to such actions by its terms; and as said by Mr. Chief Justice Gilfillan in *St. Paul v. Chicago etc. Ry. Co.*, 45 Minn. 396: "The usefulness of the cases and text-books cited as guides has been mainly done away with by the statutes. The general statute of limitations seems, and was undoubtedly intended, to include every case of an action brought by a private person. Section 13 provides: 'The limitations prescribed in this chapter for the commencement of actions shall apply to the same ²⁵⁷ actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens.' . . . 'There is no distinction suggested in either of these statutes between actions brought as 'sovereign,' or in a governmental capacity, and those brought as 'proprietary,' or such as a private person might bring for the same or a similar purpose. To hold that it was the intention to make or preserve such a distinction, so as to exclude from the operation of the statutes any actions, in whatever capacity the right involved may be claimed, would be applying a strict rule of construction, contrary to the rule that statutes of limitations, being statutes of repose, are to be liberally construed, so as to effectuate the intention of the legis-

lature." The decision from which this quotation is taken was made under a statute on all fours with ours, and is therefore very much in point in the present discussion. It was an action brought to recover possession of certain land in the city of St. Paul, which it was alleged was a public levee, and a defense of the statute of limitations prevailed. See, also, the following decisions made under a similar statute: *Abernathy v. Dennis*, 49 Mo. 468; *School Directors v. Goerges*, 50 Mo. 194; *Burch v. Winston*, 57 Mo. 62. No distinction is to be found in the decisions, under statutes providing that actions by the state shall be barred within a specified period, between actions brought in its sovereign and those brought in its proprietary capacity, but all alike are held to be within the terms of the statute. There is a line of authorities, however, which hold that such statutes have no application to actions concerning property held by the state for public purposes without power of alienation: *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; ²⁵⁸ *Board of Education v. Martin*, 92 Cal. 209. But these authorities, if sound, can have no application to the question in hand, because the board of commissioners for the sale of school and university lands not only has the power and authority to alienate and dispose of school lands, but it is expressly made its duty to do so: *Hill's Annotated Laws*, secs. 3598, 3602.

3. It is also claimed that the deed from the state to the plaintiff's grantor is a final and conclusive adjudication in his favor, and against the defendant and his predecessors in interest, in reference to their claim of adverse possession; but we know of no law giving to the action of the board of school land commissioners, in issuing and delivering to a purchaser a deed to school lands, the effect to deprive a third party of his rights, without notice, and without an opportunity to be heard. If, as we have seen, the statute of limitations runs against the state, one who has held adverse possession of state lands for the statutory period has a perfect and complete title thereto (*Parker v. Metzger*, 12 Or. 407), which cannot be taken away from him, and vested in another, by any action of the school board.

4. Again, it is contended that the land in question was granted to the state by the general government for the use of schools as upon a condition subsequent, and that upon its application to other purposes the United States has the right to re-enter and take possession, and against this right the statute of limitations does not run, and therefore no person can ac-

quire title to such lands by adverse possession prior to its alienation by the state. The vice of this position lies in the fact that the grant to the state is not upon a condition subsequent, but it is an absolute grant, vesting the title in the state for a special purpose. The language of the act of Congress is that such land "shall be granted to the state for the use of 259 schools," and the United States has no right to re-enter for any reason whatever. It follows that the judgment of the court below must be affirmed, and it is so ordered.

Adverse Possession of Public Property.*

The Public Domain.—As against the United States, title to land cannot be acquired by adverse possession: *Lindsey v. Miller*, 6 Pet. 666; *Oaksmith v. Johnston*, 92 U. S. 343; *Sparks v. Pierce*, 115 U. S. 408; *Shepley v. Cowan*, 52 Mo. 559; *Stringfellow v. Tennessee etc. R. R. Co.*, 117 Ala. 250; *Doran v. Central Pac. R. R. Co.*, 24 Cal. 246; *Wallace v. Miner*, 6 Ohio, 366; *Janes v. Wilkinson*, 2 Kan. App. 361; *Knight v. Leary*, 54 Wis. 459. The English doctrine that there can be no possession adverse to the crown applies to the United States in its relation to the public lands. It is the absolute owner of such lands, and cannot be disseised. No adverse possession is created by entry upon them, nor can such possession develop into any right against the government: *Cook v. Foster*, 7 Ill. 652. Possession of public land cannot in any case ripen into a title by prescription against the federal government: *Twining v. Burlington*, 68 Iowa, 284; however long it may continue: *Pepper v. Dunlap*, 9 Rob. (La.) 283. As is said in *Drew v. Valentine*, 18 Fed. Rep. 712: "There is no way for title to land to be divested out of the United States except in strict pursuance of some law of the United States; and as no statute of limitations runs against the United States, occupancy and possession alone, even for a great length of time, cannot ripen into title as against the United States."

The doctrine that no prescriptive rights can be secured in public lands is not restricted to individuals in their attempts to establish private ownership therein. The use of such lands by the public for a highway cannot raise a presumption of its dedication for that purpose: *Phipps v. State*, 7 Blackf. 512. A public road cannot be established by prescription over land belonging to the United States, though the land is occupied by one who intends to obtain it under the pre-emption or homestead law, but who has not yet performed

*REFERENCE TO MONOGRAPHIC NOTES.

Adverse possession: 28 Am. St. Rep. 158-162.

Mistake and ignorance respecting boundary lines as affecting adverse possession: 24 Am. St. Rep. 388-396.

Adverse possession as between husband and wife: 18 Am. St. Rep. 113-115.

Extinguishment of highways and other easements through nonuser or the operation of the statute of limitations: 14 Am. St. Rep. 278-282.

Adverse possession against municipal corporations: 48 Am. Rep. 24-38.

Remedies for injuries to real estate held adversely: 85 Am. Dec. 321-327.

What entry by the owner will terminate adverse possession: 83 Am. Dec. 497-500.

all acts prerequisite to obtaining a title: *Smith v. Smith*, 34 Kan. 293. However, under the Revised Statutes of the United States, section 2477, providing that "the right of way for the construction of highways over public lands, not reserved for public use, is hereby granted," it is held that highways may be established by prescription wherever in any state or territory that mode of establishing highways is recognized: *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858.

Public Lands—Possession as Between Individuals.—State statutes of limitation do not apply to the United States, and adverse possession under them does not confer title against a grantee of the federal government: *Redfield v. Parks*, 132 U. S. 239; *Gibson v. Chouteau*, 13 Wall. 92; *Gardiner v. Miller*, 47 Cal. 570. They do not run against him until the date of his patent: *Treadway v. Wilder*, 12 Nev. 108; *Mathews v. Ferrea*, 45 Cal. 51; *Schuttler v. Platt*, 12 Ill. 417; *Smith v. McCorkle*, 105 Mo. 135; *Godkin v. Cohn*, 80 Fed. Rep. 458. Broadly stated, the law is that, until a patent to land is issued, no adverse possession can run in favor of or against anyone: *Stephens v. Moore*, 116 Ala. 397.

When public lands have been thrown open to private acquisition, one who complies with all the requisites to entitle him to a patent for any particular lot or tract of land is regarded as the equitable owner thereof: *Wirth v. Branson*, 98 U. S. 118. A receipt from the land office issued on the payment of the purchase money for land is, so far as the acquisition by anyone else is concerned, equivalent to a patent, and when subsequently a patent issues, it relates to the inception of the patentee's right: *Defferback v. Hawke*, 115 U. S. 405; *Cavender v. Smith*, 3 G. Greene, 349, 56 Am. Dec. 541. Reasoning from these principles, a number of courts have decided that the actual issue of a patent is not necessary to set the statute of limitations in motion against a grantee of the United States; that it operates from the time he is entitled to a patent, as from the date of his final payment and the issue of a certificate of purchase by the government: *Dolen v. Black*, 48 Neb. 688; *Cady v. Eighmey*, 54 Iowa, 615; *Doe v. Hearick*, 14 Ind. 242; *Gay v. Ellis*, 33 La. Ann. 249. And in *Dillingham v. Brown*, 38 Ala. 311, it was held that the statute ran against one who had such a legal title as, without a patent, would support ejectment. These cases seem to be in conflict, and hence do not correctly state the law, with the holding of the supreme court of the United States in *Redfield v. Parks*, 132 U. S. 239. In that case a railroad company, under whose patent the plaintiff claimed, made an entry and received a certificate for the payment of the purchase money for the land in 1856, but the patent was not issued to the company until April 15, 1875, nineteen years after it had been vested with the entire equitable interest. On April 11, 1882, the plaintiff brought an action in ejectment to recover the land. The defendant contended that, as the plaintiff's title had its inception in 1856, the statute of limitations ran from

that date and was not confined in its operation to the period beginning with the issuance of the patent, which period was insufficient, within a few days, under the seven year statute to create a title by prescription in the defendant. But the court denied the defendant's contention, and held that, until the patent was issued to the railroad company, the legal title to the land in controversy was in the United States, and that while title to public land is in the United States, no adverse possession of it can confer a title which will prevail in an action of ejectment in the federal courts against the legal title under a patent from the United States. In *Gibson v. Chouteau*, 13 Wall. 102, a case somewhat similar to *Redfield v. Parks*, 132 U. S. 239, Mr. Justice Field said: "The patent is the instrument which under the laws of Congress passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in an action of ejectment in the federal courts the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title."

Again, in *Steele v. Boley*, 7 Utah, 64, it was held that the statute of limitations can begin to run against a patentee of the United States only from the issuance of his patent, and not from the date of his final payment and certificate of purchase, overruling *Steele v. Boley*, 6 Utah, 308. See, also, *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167. The same rule is applied to controversies over mineral lands in *South End Min. Co. v. Tinney*, 22 Nev. 221; *Clark v. Barnard*, 15 Mont. 176; *Mayer v. Carothers*, 14 Mont. 274.

One in possession in subordination to the federal government may hold adversely to another claimant: *Francoeur v. Newhouse*, 14 Saw. 600. Thus it is said in *Hayes v. Martin*, 45 Cal. 563, that "it is not requisite that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States, either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action." So where two claimants seek to acquire title to the same piece of land under the pre-emption laws, it is sufficient, to constitute the possession of one of them adverse to that of the other, if he claims the right to possession against all the world but the United States. The rule that possession, to be adverse, must be under color and claim of title, has no just application to a case where the parties are contesting the right of possession to a parcel of the public lands, for no color or claim of title thereto can be shown or asserted which is not inconsistent with their admission of title in the government: *Page v. Fowler*, 28 Cal. 611.

Though a patentee of the United States, or one claiming under him, may be barred of his right of entry or of defense by an adverse holding for the statutory period (*Coker v. Ferguson*, 70 Ala. 284), there can be no such holding against him unless a new entry is made after the government grant; after it, he who made the original entry remains an intruder: *Cook v. Foster*, 7 Ill. 652; *Hughes v. Stevers*, 95 Ill. 391. Still the fact that a claimant enters into possession of land while it belonged to the United States does not prevent him from holding adversely when the government divests itself of title: *Hargis v. Congressional Township*, 29 Ind. 70.

In case of concurrent possession under two adjoining surveys, while the true location of the line of the senior patent must control, still the actual possession under the junior patent may ripen into a perfect title, in the absence of such a claim and possession under the senior patent: *Swope v. Schafer* (Ky. App.), 4 S. W. Rep. 300. And where a wife of a settler under the donation act died after final proof, but before issue of the patent, the land to which the wife would have been entitled passed to her husband and children in equal parts on the issuance of the patent, and limitation did not begin to run against the rights of the husband's heirs to have partition until the land was finally divided by the surveyor general: *Traver v. Tribou*, 15 Fed. Rep. 25. A pre-emption claimant cannot avail himself of the statute of limitations when his claim is of land already held by another under a patent, or a location and survey entitling him to a patent: *Clark v. Smith*, 59 Tex. 275. Moreover, if land, the title to which is in the United States, is sold for taxes, and subsequently a patent is issued therefor, possession under the tax deed prior to the issue of the patent will not bar a recovery by the patentee: *Thompson v. Prince*, 67 Ill. 281; *Bonner v. Phillips*, 77 Ala. 427; and if one attempts to enter land, but through mistake the entry and patent describe other land, and subsequently the patent is canceled, and another correctly describing the land is issued prior to the issuing of the second patent, the statute does not run against the patentee in favor of one in possession under a tax title: *Churchill v. Sowards*, 78 Iowa, 472.

Adverse possession for ten years under a claim of title by a confirmation by act of Congress gives one a perfect title: *Carondelet v. Simon*, 37 Mo. 408; and may be initiated before an approved survey by the United States, if of a definite lot of land: *St. Louis University v. McCune*, 28 Mo. 481; *Aubuchon v. Ames*, 27 Mo. 89. The statute of limitations is in operation against a claimant of a field lot included within a Spanish grant from the time of its confirmation by Congress, regardless of the date of survey of the lot, the approval thereof, or of its return to the recorder of land titles: *Peting v. De Love*, 71 Mo. 13. In the case of a Mexican grant requiring confirmation, the statute does not begin to run until the grant is confirmed, and final confirmation within the meaning of the statute is the issue of a patent by the United States: *Hagar v. Spect*, 48 Cal. 406; *Davis*

v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Galindo v. Wittenmeyer, 49 Cal. 12. The statute is not set in motion by an approval by the surveyor general of a survey made by himself: Sabichi v. Aguilar, 43 Cal. 285; or by a survey under the act of Congress of June 14, 1860, becoming final: De Miranda v. Toomey, 51 Cal. 165. If two confirmations of land titles are of equal dignity, and one is regularly located and followed by possession, and no steps are taken under the other, the confirmee of the first title will hold the land by a prescription of ten years: Wilcoxon v. Rogers, 16 La. 6.

Under the act of Congress of July 27, 1866, granting lands to aid in the construction of a railroad and telegraph line from Missouri and Arkansas to the Pacific coast, the lands became subject to adverse possession when the map showing the location of the road was filed in the general land office; and the effect of such possession was not interrupted by the subsequent issue of a patent to the grantee, or the contest respecting the title in the land department between the adverse possessor and the railroad company: Southern Pac. R. R. Co. v. Whitaker, 109 Cal. 268.

Where one has been in possession of land as a homestead for more than ten years, claiming title thereto against all the world except the United States, but prior to his occupancy the land, through an alleged mistake in the land department, was patented to others, he gains a perfect title as against the patentees: Fellows v. Evans, 33 Or. 30. And a homestead claimant who has complied with the homestead law and obtained a receiver's receipt for a payment in full for land, may maintain ejectment against those in adverse possession at the time of his entry, and who so continued for more than five years prior to the final payment for the land: Wormouth v. Gardner, 105 Cal. 149.

While land is a part of the "Indian country," and the Indians' right of occupancy has not been terminated by the United States, there can be no adverse possession of it by a private individual: Kreuger v. Schultz, 6 N. Dak. 310.

Color of Title to United States Land.—While time does not run against the United States, nor against its grantee prior to the date of his patent, yet certain invalid or imperfect instruments of conveyance of public land are color of title to support prescriptive rights as between individuals after the government has divested itself of title by issuing a patent. Accordingly, it is held that a land officer's certificate supports prescription, and is proof of title equivalent to a patent against all but the actual holder of a patent: Carroll v. Patrick, 23 Neb. 834. A receipt from a local land office for the payment of pre-emption money, sufficient on its face to convey the full equitable title to the pre-emptioner, is color of title, though at the time the land was not subject to pre-emption or homestead: Texas etc. Ry. Co. v. Smith, 159 U. S. 66. And the receipt of a receiver of the land office issued upon payment of the purchase money for land to the government, containing a description thereof,

but afterward canceled without notice to the purchaser or return of the purchase money, is such a conveyance as will support title by adverse possession against one to whom a patent issued prior to the date of the receipt: *Cawley v. Johnson*, 21 Fed. Rep. 492; *Hannibal etc. R. R. Co. v. Clark*, 68 Mo. 371. A tax deed, void because the land belongs to the United States, is color of title, and the statute runs in favor of one in possession under it against a grantor of the government from the time the latter procures his title: *Chicago etc. Ry. Co. v. Allfree*, 64 Iowa, 500. And one in possession of land under a deed purporting to convey it to him has color of title so that he may, when sued in trespass by a patentee of the United States, contest the validity of the plaintiff's patent: *Saltmarsh v. Crommelin*, 24 Ala. 347. A swamp-land certificate is color of title: *Goodwin v. McCabe*, 75 Cal. 584; so, too, is a patent from the United States at a time when it has no title: *Sanford v. Cloud*, 17 Fla. 557; as when it grants land previously confirmed by the governor of the Northwest Territory pursuant to an act of Congress: *Payne v. Markle*, 89 Ill. 66. A patent subject to rights confirmed by Congress (*Lender v. Kidder*, 23 Ill. 50; *Williams v. Ballance*, 23 Ill. 193, 74 Am. Dec. 187) and controlled by a subsequent survey, will sustain prescriptive rights: *Bryan v. Forsyth*, 19 How. 334.

On the other hand, a pre-emption claim, until perfected, is not color of title: *Buford v. Bostick*, 58 Tex. 63; *Sutton v. Carabajal*, 26 Tex. 497. A certificate showing that a party proved himself entitled to a pre-emption is not sufficient: *Spellman v. Curtenius*, 12 Ill. 409. Neither is a certificate of purchase under an invalid survey, if the parties in possession have notice of the defects in their title: *Melancon v. Bringier*, 13 La. Ann. 206. When a defendant's title is not traced to a sovereign grant, possession under a purchase from private vendors does not constitute title by adverse possession against one who claims under a patent from the United States, issued within ten years prior to the institution of the suit: *Laidlaw v. Landry*, 12 La. Ann. 151. And if an Indian acquires land under a federal statute giving Indians who abandon their tribal relations the right to enter land under the homestead law, and his patent does not disclose that by the terms of the statute his land is made inalienable for five years, and within that period he executes a conveyance, the possession of the grantee knowing his grantor to be an Indian is not in good faith under color of title as is required to defeat a subsequent conveyance after the Indian was relieved of his disability: *Taylor v. Brown*, 5 Dak. Ter. 335.

Waters on Public Lands.—No prescriptive right to the use of water can be acquired against the United States: *Wilkins v. McCue*, 46 Cal. 656. A running stream is a part and parcel of the land through which it flows, and as the United States is the absolute and unqualified owner of the public domain, a patent carries not only the land but the water flowing through it. While land is owned by the federal government there can be no adverse user of a stream flowing

through it which can be made available by one so using it to support a title by prescription against a grantee of the government. Such adverse holding, to ripen into a prescriptive title, must continue for the full statutory period after the United States has conveyed its title to the land: *Union Mill etc. Co. v. Ferris*, 2 Saw. 176; *Vansickle v. Haines*, 7 Nev. 249.

Lakes, Rivers, Dams, and Docks.—A prescriptive right to lower the water of a great pond below low-water mark may be obtained by a person when the statute of limitations is made applicable to real actions brought by the commonwealth, and an amendment to the statute excepting from its operation the title of the state to great ponds does not divest such prescriptive rights already gained: *Attorney General v. Revere Copper Co.*, 152 Mass. 444. If a person artificially raises the level of the waters of a navigable lake, and maintains such condition for a length of time sufficient to confer title by prescription, during which time the public use and enjoy such lake, the title to his land thereunder vests in the state by dedication, and he is estopped to revoke such dedication: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859. Exclusive possession and use of a dock adjoining a wharf extending into tide water is sufficient, under the Massachusetts statute, to establish title thereto against the commonwealth: *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132.

Statutes requiring that dams across streams be so constructed, or, if already constructed, so altered, as not to interfere with the passage of fish, have raised the question whether or not, by maintaining a dam for the statutory period, one may not gain a prescriptive right as against a commonwealth to compel the erection of fishways. It is held under these statutes that no right to maintain dams without providing for the passage of fish can be founded on prescription: *State v. Beardsley*, 108 Iowa, 396; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513; *Cottrill v. Myrick*, 12 Me. 222; *West Point Water etc. Co. v. State*, 49 Neb. 218. There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream: *Olive v. State*, 86 Ala. 88; *Ingram v. Police Jury of St. Tammany*, 20 La. Ann. 226; *Arundel v. McCulloch*, 10 Mass. 70.

Oyster Beds.—An individual cannot resist the claim of a commonwealth to an oyster bottom by proof of long possession, for time does not run against a state: *Hurst v. Dulany*, 84 Va. 701. If an oyster bed is designated to one in violation of a statute which prohibits the designation of natural oyster beds, he cannot by possession of the beds acquire prescriptive rights therein, the title to them being in the state: *Clinton v. Bacon*, 56 Conn. 508.

Mineral Lands.—Where a portion of the public mineral domain has been taken possession of by settlers and improvements made thereon, and subsequently mineral claims have been there located and patented—a circumstance of frequent occurrence in the location of towns and villages—it may become of vital importance,

in adjusting the property rights of the two classes of claimants, to ascertain when the possession of him who erects the surface improvements begins to be adverse to the mineral claimant. When will the statute be set in motion against the latter—from the time of the location of his claim, or of the issuance of his certificate of purchase, or of the issuance of his patent? The rule before laid down is applicable here, namely, that the statute of limitations does not begin to run against a grantee of the United States prior to the date of his patent. It does not run against a patentee of a mineral claim in favor of one who has improved the surface for purposes other than mining until the issue of the former's patent: *Nessler v. Bigelow*, 60 Cal. 98. The location of a claim does not set the statute in motion: *King v. Thomas*, 6 Mont. 409; neither does the final payment by the patentee and the issue of a certificate of purchase by the government: *Mayer v. Carothers*, 14 Mont. 274; *Clark v. Barnard*, 15 Mont. 176; *South End Min. Co. v. Tinney*, 22 Nev. 221.

School Lands.—When by act of Congress the sixteenth sections of the public lands were dedicated to the states for the support of schools, title thereto was reserved in the United States until the states acted in reference to such lands by applying them to the purpose for which they were dedicated. The title to them before the states took such action could not be affected by adverse holdings: *Rabb v. Supervisors etc.*, 62 Miss. 589. But when public land was selected by the secretary of the treasury under the act of Congress of May 20, 1826, the title thereto vested in the inhabitants of the townships, and a cause of action then accrued against any persons holding adversely. And the fact that a claimant entered into possession of a portion of such land while the title to it was in the United States did not prevent his holding from becoming adverse to a township as soon as the title vested in it: *Hargis v. Congressional Township*, 29 Ind. 70. So trustees of a township holding land granted to them by the federal government for school purposes are within the operation of the statute of limitations: *Oxford Township v. Columbia*, 38 Ohio St. 87. But in *Board of Education v. Martin*, 92 Cal. 209, it is held that a schoolhouse site reserved by a city is public property to which no title by adverse possession can be acquired.

An adverse possession of school land for ten years will create a title as against one who holds a patent to it from the township trustees: *Tennessee Coal etc. Co. v. Linn* (Ala., 1899), 26 So. Rep. 244. But where one purchases school land, but under his certificate of purchase gains only a right of possession until the purchase money is paid and a patent is issued by the state, adverse possession, to confer title, must be for twenty years, the period necessary to bar a recovery by the state: *Prestwood v. Watson*, 111 Ala. 604. The statute of limitations is applicable where a plaintiff in ejectment claims school land under a grant from the state, and

the defendant under a plea of adverse possession shows a purchase from a township and an adverse holding thereunder for more than twenty years before the commencement of the action: *Wyatt v. Tisdale*, 97 Ala. 594. And if a purchaser at a sheriff's sale under an execution against one who bought land from the trustees of a township goes into possession and holds under the sheriff's deed, he is in under color of title, his possession becomes adverse, and he may acquire against the township by limitation, though the statute would not run against the first purchaser till he paid the purchase money: *Miller v. State*, 38 Ala. 600.

In Texas it is held that when the land board without authority declares a purchase of school land forfeited, one who afterward buys of the state has neither title nor color of title, and the statute cannot avail him when sued in trespass by the first purchaser: *McCown v. McCafferty*, 14 Tex. Civ. App. 77. Color of title, however, within the meaning of the Texas statute differs from that term as ordinarily defined by the courts: See post, p. 491.

Forfeited and Escheated Lands.—Where the statute of limitations is not made applicable to the commonwealth, adverse possession begun against the owner of land subsequently forfeited to the state for nonpayment of taxes is not, after the forfeiture, adverse to the state nor to its grantee, except from the date of his title: *Hall v. Webb*, 21 W. Va. 318; *Levasser v. Washburn*, 11 Gratt. 572; *Hale v. Branscum*, 10 Gratt. 418; though when such lands are sold by the auditor, his deed becomes good color of title: *Woodward v. Blanchard*, 16 Ill. 424. Furthermore, the statute of limitations, when not applicable to the state, cannot bar an escheat, nor give a right of action to escheated land against one in possession, no matter by what means the possession may have been acquired: *Harlock v. Jackson*, 3 Brev. 254. When the owner of real property dies intestate and leaves no heirs, the title to the land immediately vests in the state without inquest of office. Therefore, in a proceeding by the state under the statute of escheats, a defendant cannot set up adverse possession of the property taken after the death of the intestate and prior to the institution of proceedings by the state. The case comes within the rule which rejects the defense of the statute of limitations against the state: *Ellis v. State*, 3 Tex. Civ. App. 170.

Cemetery, Hospital Site, and Engine Lot.—Where a town dedicates land for a burial place and other public uses, the dedication is to a charitable use for a limited portion of the public, and hence title to such land can be acquired by prescription: *Mowry v. Providence*, 10 R. I. 52. Compare *Commonwealth v. Viall*, 2 Allen, 512. But if land belonging to a county, purchased and used by it for hospital purposes, is taken possession of by an intruder, his possession, however long continued, cannot create a prescriptive title in his favor: *Yolo v. Barney*, 79 Cal. 375, 12 Am. St. Rep. 152. So

If a city reserves an engine lot, the reservation is for a public use, and an individual cannot gain a title therein by adverse possession: *San Francisco v. Bradbury*, 92 Cal. 414.

State Lands.—The statute of limitations does not run against a commonwealth so as to give title to one adversely holding land belonging to it, unless the state is expressly made subject to such statute: *Peareson v. Arledge*, 2 Bail. 401, 23 Am. Dec. 145; *Carey v. Whitney*, 48 Me. 516; *Ward v. Bartholomew*, 6 Pick. 408; *Frontman v. May*, 33 Pa. St. 455; *State v. Buck*, 46 La. Ann. 656; *Hurst v. Dulany*, 84 Va. 701; *Wilson v. Hudson*, 8 Yerg. 398; *Glaze v. Western etc. R. R. Co.*, 67 Ga. 761; *Swann v. Gaston*, 87 Ala. 569; *Zubler v. Schrack*, 46 Pa. St. 67; *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, 32 Am. Dec. 718; *Hammond v. Shepard*, 186 Ill. 235; *Hall v. Gittings*, 2 Har. & J. 112; and if a commonwealth submits itself to the operation of the statute, no time elapsing before the date of the statute can be computed against it: *Clements v. Anderson*, 46 Miss. 581. Though the statute of limitations is made applicable to a commonwealth, it should be observed that, in its relation to property, a commonwealth presents two aspects—the one as a mere proprietor, the other as a sovereign state. In its proprietary capacity, it may hold property in the same manner as an individual. It may alien or surrender it as he may. Hence of such property it may be devested through the operation of the statute of limitations: *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *People v. Trinity Church*, 22 N. Y. 44; *People v. Clarke*, 10 Barb. 120; *Price v. Jackson*, 91 N. C. 14; *Busby v. Florida etc. R. R. Co.*, 45 S. C. 312; *Wyatt v. Tisdale*, 97 Ala. 594; *Abernathy v. Dennis*, 49 Mo. 468; *Burch v. Winston*, 57 Mo. 62. In its capacity as a state, a commonwealth holds property in an entirely different sense. Property so held belongs to the people in virtue of their sovereign rights, and of it they cannot be deprived save by their own appointment as expressed in the constitution. Legislatures cannot imperil such property. Statutes may prescribe for its regulation, but not for its loss by the public and its acquisition by individuals by prescription or otherwise. On this subject Chief Justice Elliott says: "It may well be doubted whether the statute of limitations applies to the state in its sovereign capacity. It may well be held that the limitation is not applicable to the exercise of the attributes of sovereignty. It often happens that the state deals as a citizen in selling property or making contracts, and when it so acts the statute clearly applies. But where sovereign rights incapable of surrender or alienation are concerned, it may be seriously questioned whether the statute limits or restrains. *Sims v. Frankfort*, 79 Ind. 446. Again, President Dent, in *Ralston v. Weston*, 46 W. Va. 544, post, p. 834, uses this language: "That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals, by express statutory provision, there

can be no question; but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained." In *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. Rep. 404, it is held that a prescriptive title to land covered by tide water cannot be acquired by prescription when the title is vested in the state, and it is incompetent to make any grant thereof, because title by prescription presumes a grant, and such a presumption cannot be entertained against one incapable of granting. As this question most frequently arises where prescriptive rights are asserted in public easements, its further discussion in this note will be found under the head of "Highways, Streets, and Parks."

Possession of State Lands as Between Individuals.—If the statute of limitations is not operative against a commonwealth, and hence cannot confer title to land as against it, it follows that the statute cannot begin to run as between individual claimants of such land until the title of the government is divested: *Clements v. Anderson*, 46 Miss. 581; *Paschal v. Dangerfield*, 37 Tex. 273; *Jackson v. Vail*, 7 Wend. 125; *Chiles v. Calk*, 4 Bibb, 554; *Wilson v. Hudson*, 8 Yerg. 397; *Overton v. Davisson*, 1 Gratt. 216, 42 Am. Dec. 544. It seems, however, that the title need not pass absolutely out of the state, but that limitation may run against a grantee thereof if he obtains only an equitable title, though not against the state. Limitation operates against a settler, if there is adverse possession, from the day his equitable right by settlement first commenced, whatever may be the date of his paper title: *Munshower v. Patton*, 10 Serg. & R. 334, 13 Am. Dec. 678. A descriptive warrant and survey upon which a part of the purchase money has been paid gives the warrantee such an equitable interest in the land as will set the statute in motion from the date of the warrant in favor of an adverse claimant: *Keller v. Powell*, 142 Pa. St. 96. Where the state is in no sense a party, a defendant in ejectment may successfully plead title acquired by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, whether a patent has subsequently been granted or not: *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576. Land surveyed under location of a land certificate is separated from the public domain, and the equitable title vested in the holder of the certificate, against whom the land may be held adversely: *Udell v. Peak*, 70 Tex. 547. The reservation by a state of the ulterior equitable interest in land which it sells does not prevent the statute from running against the grantee from the date of the conveyance in favor of one in possession of the land when granted: *Alabama Land etc. Co. v. Kyle*, 99 Ala. 474.

Though no limitation is available to a claimant until the title, legal or equitable, has passed from the state (*Montgomery v. Gunther*, 81 Tex. 320), a grantee of the people is barred by an adverse possession for the statutory period after his title accrued,

though it commenced before: *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *Campbell v. Thomas*, 9 B. Mon. 82; that is, he may be disseised by one whose possession began while title was in the commonwealth, and hence when no disseisin was possible, such possession having been adverse in its inception and having so continued after the grant: *Kinsell v. Daggett*, 11 Me. 309. A junior patentee may go behind his own patent and also that of a senior patentee to give color to his possession from or after the granting of the older patent: *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108; but if there can be no adverse possession against the commonwealth, he cannot show possession further back than the senior grant: *Koiner v. Rankin*, 11 Gratt. 420. On its emanation his possession becomes adverse instant: *Cline v. Catron*, 22 Gratt. 392. The statute does not run against a holder of marsh and overflowed land whose title is based upon a certificate of purchase from the state until the United States certifies the land to the state: *Packard v. Moss*, 68 Cal. 123.

Where entry is made on a demarked survey, a patent to which has already issued to another, and in virtue of the survey a patent is subsequently issued, limitation runs from the entry and is not confined to the date of the patent; and a senior patentee who acquires possession of such premises after his right of entry is tolled is liable to an ejectment on a possession of more than twenty years in the junior patentee: *Roberts v. Sanders*, 3 A. K. Marsh. 28. However, the adverse possession of a junior patentee, in order to bar recovery by a senior patentee, must have been not only actual, but so continued for the statutory period as to have furnished a cause of action every day during that time: *Barr v. Potter* (Ky. App.), 57 S. W. Rep. 478.

If one purchases the improvements and claim of another in possession of agricultural college lands in the belief that he can acquire title thereto under the homestead law, and it does not appear that he changed the character of his possession on learning that he could not so obtain title, or when he commenced holding adversely, if at all, he is not entitled to the land as against a grantee of the state under claim of adverse possession: *Hunnewell v. Adams*, 153 Mo. 440.

The statute of limitations will run against a board of proprietors as well as against individuals, and an adverse possession for the statutory period will bar its right of recovery: *Cornelius v. Giberson*, 25 N. J. L. 1; *Yard v. Ocean Beach Assn.*, 49 N. J. Eq. 306.

Color of Title to State Lands.—Claim of title, however groundless, makes a possession adverse, and such possession will ripen into title against the people or an individual: *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463. Whether an adverse possession under a claim of title is under a good or bad, legal or equitable title, is immaterial: *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108; color of title being that which in appearance is title but which

in reality is not: *Wright v. Mattison*, 18 How. 56; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Tate v. Southard*, 3 Hawks, 119, 14 Am. Dec. 578, and extended note. A void grant from a state is color of title, at least so far as to support adverse possession against an individual, if not against the state: *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210.

So, too, is a fraudulent grant of state land: *Oliver v. Pullam*, 24 Fed. Rep. 127; and a grant of land which previously has been granted to another: *East Tennessee Iron etc. Co. v. Wiggin*, 68 Fed. 446; and a grant from a state which purports to be made in pursuance of a statute providing for the relief of persons whose title deeds have been destroyed by the burning of certain court-houses: *Kron v. Hinson*, 53 N. C. 347; and an act of the legislature vesting land in the trustees of an academy, though unconstitutional, is color of title: *Trustees etc. v. Newbern Academy*, 9 N. C. 233. If land is forfeited to a state for the nonpayment of taxes, and afterward sold by the auditor, his deed is color of title: *Woodward v. Blanchard*, 16 Ill. 424; or if land is bought by a state when sold for unpaid taxes, the auditor's certificate to one redeeming the land and purporting to convey the state's title therein is probably a claim and color of title: *Boykin v. Smith*, 65 Ala. 294. A grant from a foreign government may be a foundation for adverse possession: *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463. Where one enters upon land previously granted by the state to another, and procures a deputy surveyor to survey the same, without a warrant or other authority, the statute will run in his favor to the extent of his claim: *Lawrence v. Hunter*, 9 Watts, 64; and though a record of survey is not itself color of title, it may be evidence tending to show claim of title: *Atkinson v. Patterson*, 46 Vt. 750.

A patent from a state for a certain tract reserving land therein previously granted is not color of title to the land excepted: *Basnight v. Smith*, 112 N. C. 229; and a survey without a warrant or some evidence of it other than a recital in the survey, and without having been returned to the land office, is not evidence of an adverse title: *Kester v. Rockel*, 2 Watts & S. 365. A land office warrant issued by one state, and a patent thereon, for land described as and declared to be located in such state, cannot give color of title to land within another state to one who otherwise would be a mere trespasser: *Baker v. Swan*, 32 Md. 355. Where a state legislature grants land to an Indian to hold and enjoy without the power to convey it, his deed of such land is not color of title: *Smythe v. Henry*, 41 Fed. Rep. 705.

Color of title, as defined by the Texas statute of limitations, is construed to be "very different from" color of title as generally defined by the courts, namely, "that which in appearance is title, but which in reality is no title": *Marsh v. Weir*, 21 Tex. 98. Under this statute, a grant to constitute color of title must be effectual

to convey to the grantee whatever title the government has in the land, though it need not pass the paramount title, yet it must be title as against the government, valid when tested by itself and not tried by the title of others: *Smith v. Power*, 23 Tex. 30. So it is held that an unrecommended land certificate and a survey thereunder being mere nullities cannot give color of title: *Whitehead v. Foley*, 28 Tex. 268; nor can a grant after having been adjudged void by a competent tribunal: *Marsh v. Weir*, 21 Tex. 98. And if a patent for want of authority in the officer who issues it is void and in no way binding on the commonwealth, an adverse possession cannot be built upon it: *Land etc. Co. v. State*, 1 Tex. Civ. App. 616; or if one who has made a location of land makes a conveyance thereof, a subsequent deed from him to another after a patent has issued is not color of title: *Illies v. Frerichs*, 11 Tex. Civ. App. 575.

Highways, Streets, Parks, etc.—Prescriptive rights in highways, streets, and parks are treated at considerable length in the note to *Orr v. O'Brien*, 14 Am. St. Rep. 273-282. A number of the states are committed to the doctrine that title by adverse possession can be acquired in such public easements: *Fort Smith v. McKibben*, 41 Ark. 45, 43 Am. Rep. 19; *Litchfield v. Wilmot*, 2 Root, 288; *Cornwall v. Louisville etc. R. R. Co.*, 87 Ky. 72; *Essexville v. Emery*, 90 Mich. 183; *Moon v. Mills*, 119 Mich. 298, 75 Am. St. Rep. 390; *St. Paul v. Chicago etc. R. R. Co.*, 45 Minn. 387; *Lewis v. Baker*, 39 Neb. 636; *Meyer v. Lincoln*, 33 Neb. 566, 29 Am. St. Rep. 500; *Knight v. Heaton*, 22 Vt. 480. This misconception of the law seems traceable to two sources: 1. A failure to recognize that a statute of limitations which applies to a commonwealth does not apply to the people in their sovereign capacity; and 2. The seeming inequity of ousting individuals who in apparent good faith have erected valuable improvements on land dedicated to the public use. These we shall examine in their order.

There are certain attributes of sovereignty, prominent among which are the power of taxation, the police power, and the power of eminent domain, common to all governments and old as political society. These, it is a favorite expression of the courts, cannot be granted, contracted, or bartered away by the legislature or other governmental agencies. They are a proper subject for legislative regulation, but their impairment or surrender can be affected only by the people themselves, speaking through the constitution. That the right of the people to the use of streets, highways, and other like easements is a sovereign right to be classed with the above attributes of sovereignty, and hence beyond the power of individuals or legislatures to abridge, is apparent in considering it in relation to its correlative, the right of eminent domain. The one is the right to take property for public use; the other, the right of the public to retain and use such property when once taken. Would it not be a curious doctrine that would clothe a

government with power to appropriate the property of individuals, and on the other hand invest them with the power to reappropriate it? Yet this is the outcome of permitting prescriptive rights to be acquired in public easements. The power of a commonwealth to retain property taken for public uses should not be less comprehensive, less potent, than its power to take it. If one is an attribute of sovereignty, is there any reason why the other is not? Each is the correlative of the other; they must stand or fall together. The power of eminent domain is shorn of its sovereign efficacy and dignity if individuals can reappropriate what has been taken under it.

In defense of the doctrine that highways and other public easements may be made the subject of adverse possession, it is asserted that statutes of limitation, being statutes of repose, should be liberally construed so as to effectuate the intention of the legislature; and that to exclude from their operation any action that a state might bring would be giving them a strict construction. The answer to this is the elementary principle that legislatures in the enactment of statutes cannot be presumed to transcend their constitutional authority, which they would do should they attempt to abridge the sovereign rights of the people. Again, it is contended that there is no reason why a state should not be barred of its right of action to recover property as well as an individual. One has not far to look for reasons why a state in respect to its sovereign rights should not be so affected. "Experience does not justify the presumption that the community at large will assert their rights with the same promptness with which individuals assert their private rights. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have sufficient interest to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right. . . . The people do not and cannot act in a body. Their power must of necessity be exercised through agents. It cannot be expected that these agents will manifest the same diligence in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights": *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513. No man wishes to single out himself and be an actor against his neighbor. What is every one's concern is no one's, and hence it is that no time should bar the enforcement of a public right. Public easements belong to the people and cannot be aliened or otherwise disposed of, except in accordance with their will. To permit individuals to acquire title therein by prescription allows them to accomplish through the want of vigilance or the indulgence of the public, or through their own mistake or cupidity, what they could not accomplish legitimately. The great weight of authority supports the proposition that title by ad-

verse possession cannot be acquired in streets, highways, or other property dedicated to the use of the public: *Webb v. Demopolis*, 95 Ala. 116; *Reed v. Birmingham*, 92 Ala. 339; *Ames v. San Diego*, 101 Cal. 390; *Yolo v. Barney*, 79 Cal. 375, 12 Am. St. Rep. 152; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303; *Ralston v. Weston*, 46 W. Va. 544, post, p. 834; *Lee v. Mound Station*, 118 Ill. 304; *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Sullivan v. Tichenor*, 179 Ill. 97; *Schmidt v. Draper*, 137 Ind. 249; *Cheek v. Aurora*, 92 Ind. 107; *Heddleston v. Hendricks*, 52 Ohio St. 466; *Childs v. Nelson*, 69 Wis. 125; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599; *Rung v. Shonenberger*, 2 Watts, 23, 26 Am. Dec. 95; *Driggs v. Phillips*, 103 N. Y. 77; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Laing v. United New Jersey R. R. etc. Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682; *Price v. Plainfield*, 40 N. J. L. 608; *State v. Trenton*, 36 N. J. L. 198; *Ulman v. Charles Street Ave. Co.*, 83 Md. 130; *Almy v. Church*, 18 R. I. 182; *Simmons v. Cornell*, 1 R. I. 519; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860; *Taylor v. Commonwealth*, 29 Gratt. 780; *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752; *Moose v. Carson*, 104 N. C. 431, 17 Am. St. Rep. 681; *Vicksburg v. Marshall*, 59 Miss. 563; *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217; *Shreveport v. Walpole*, 22 La. Ann. 526; *Sims v. Chattanooga*, 2 Lea, 694; *Raht v. Southern Ry. Co. (Tenn.)*, 50 S. W. Rep. 72; *Waterloo v. Union Mill Co.*, 72 Iowa, 437; *Taraldson v. Lime Springs*, 92 Iowa, 187; *Williams v. St. Louis*, 120 Mo. 403; *Sayles' Texas Civ. Stats.*, art. 3351 (3200); *N. H. Pub. Stats.*, c. 77, sec. 7; *Simplot v. Chicago etc. Ry. Co.*, 16 Fed. Rep. 350; *Grogan v. Hayward*, 4 Fed. Rep. 161.

While denying that the statute of limitations can deprive the people of their right in public easements, some courts hold that an estoppel in pais may work such a deprivation; that though a mere exploiter of public rights can gain no prescriptive title in property devoted to a public use, yet an individual who in good faith and with the acquiescence of the public makes expensive improvements thereon may invoke the doctrine of equitable estoppel against the people's assertion of their rights: *Chicago R. R. Co. v. Joliet*, 79 Ill. 25; *Chicago etc. Ry. Co. v. People*, 91 Ill. 251; *Collett v. Vanderburgh County*, 119 Ind. 27; *Hamilton v. State*, 106 Ind. 361; *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752. We doubt the soundness of this view. One who encroaches on a public easement must know, in contemplation of law, that the easement belongs to the public, and is not susceptible of private ownership or acquisition. An individual being chargeable with this knowledge, as a matter of law, one of the essentials of an equitable estoppel is wanting. Moreover, his encroachment is wrong from its beginning and throughout its continuance, and a claim so founded can find no countenance in a court of equity. The law seems enunciated correctly in *Webb v. Demopolis*, 95 Ala. 116, where it is

held that neither a city's "acquiescence in an obstruction or private use of a street by a citizen, nor laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription can defeat the right of the city to maintain a suit in equity to remove the obstruction." To the same effect is *Ralston v. Weston*, 46 W. Va. 544, post, p. 834.

FLYNN v. BAISLEY.

[35 OREGON, 268.]

FRAUDULENT CONVEYANCES.—A CONVEYANCE OF LANDS WITHOUT A VALUABLE CONSIDERATION by one who is indebted at the time is presumptively a fraud upon his creditors, who have an equitable right to set it aside or to avoid it, at least to the extent of the debts due them.

PARENT AND CHILD—RIGHT TO EARNINGS—EMANCIPATION.—Where a parent has in good faith emancipated his minor child, and relinquished all right to his earnings, his creditors cannot reach earnings thereafter acquired by such minor to apply them in payment of the parent's debts.

PARENT AND CHILD—EMANCIPATION—EVIDENCE.—A writing is unnecessary to establish the emancipation of an infant, but it may be implied from the circumstances.

FRAUDULENT CONVEYANCES.—WHERE A PARENT IN GOOD FAITH EMANCIPATED HIS SONS while he was in good financial circumstances, and thereafter, during their minority, they earned money which they loaned to him, a conveyance of real estate by the father to his sons in consideration of such loans is made upon a valuable consideration, and will not be set aside as being in fraud of creditors.

John L. Rand and Hyde & Packwood, for the appellant.

Butcher & Eastham and W. F. Butcher, for the respondents.

269 MOORE, J. This is a suit to set aside a deed, and to subject a part of the real property described therein to the lien of a judgment against the grantor. It is alleged in the complaint that on July 1, 1893, the defendant S. B. Baisley executed to the Baker City National Bank his promissory note for the sum of three thousand five hundred and eighty-eight dollars, payable six months after date, with interest at the rate of ten per cent per annum; that plaintiff thereafter became the owner thereof, and on March 6, 1898, recovered judgment thereon, upon which an execution was issued, and returned wholly unsatisfied; that at the time said note was executed Baisley was the owner in fee of the south half of the southeast quarter and

the southeast quarter of the southwest quarter of section 15, in township 7 south, of range 38 east of the Willamette meridian; the west half of the southeast quarter of section 25, the south half of section 26, the east half and the northwest quarter of section 35, in township 8 south, of range 39 east of said meridian, in Baker county, containing one thousand acres, more or less; that on December 1, 1894, Baisley and wife, for the expressed consideration of six thousand dollars, executed to their sons, Perry A. and J. H. Baisley, a general warranty deed of said property; that no consideration was paid for the conveyance; that it was executed with intent to hinder, delay, and defraud the creditors of S. B. Baisley; that the premises therein described were then of the reasonable value of ten thousand dollars; and that Baisley had no other property out of which plaintiff's judgment, or any part thereof, can be satisfied. The answer denies the material allegations of the complaint, and avers that S. B. Baisley, on December 1, 1894, was indebted to Perry A. and J. H. Baisley in the sums of five hundred dollars and one hundred and twenty-five dollars, respectively, in consideration of which, and of their payment of the sum of twenty-five dollars, ²⁷⁰ and agreement to discharge the principal of two mortgages to secure the sums of three thousand three hundred and fifty dollars and two thousand dollars, executed to them a deed of the north half of lot 3 and the south thirty feet of lot 4 in block 4 in the United States townsite of Baker City, the east half of section 35, in township 8 south, of range 39 east, and an undivided one-tenth in fee and a dower interest in the other property described in the complaint, for which he received an adequate consideration. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

It is contended by plaintiff's counsel that the evidence shows that the conveyance was voluntary, and that, Baisley being indebted to plaintiff's assignor at the time it was executed, the court erred in dismissing the suit. The evidence shows that on December 1, 1894, said lots in Baker City, together with a building thereon, known as "Meier's Hotel," were encumbered with a mortgage executed by Baisley and wife to the Baker City National Bank, to secure the sum of three thousand three hundred and fifty dollars; that the east half of section 35 in township 8 south, of range 39 east, was subject to a mortgage executed by them to the Lombard Investment Company, to se-

cure the sum of two thousand dollars, and that such encumbrance on the hotel property was also a second lien thereon, but that the undivided one-tenth of the other tracts, equivalent to sixty-eight acres, was unencumbered; that the grantees in said deed sold the lots in Baker City some time in 1896, for the sum of three thousand dollars, in consideration of which, and the further sum of fifty dollars, said bank entered satisfaction in full of its mortgage, thereby relinquishing the sum of seven hundred and fifty-seven dollars and fifty-eight cents, and releasing the east half of said section 35 from the lien thereof; that they paid the interest and three hundred dollars of the principal due upon said Lombard Investment Company's mortgage, and secured an extension of two years for the payment of the remainder; that ²⁷¹ when said deed was executed to them they were aged twenty-one and nineteen years, respectively; that Perry, being permitted by his father to labor on his own account during the latter years of his minority, and to retain his earnings, operated a boarding-house at the gold mines in said county, and was thereafter employed as a bookkeeper in the Baker City National Bank, whereby he accumulated the sum of five hundred dollars, which he loaned to his father prior to the execution of the deed; that J. H. Baisley labored under the same privileges and conditions as his brother, and earned one hundred and twenty-five dollars during his minority, which he loaned to his father, and which the latter owed him at the time the deed was executed. It is argued by plaintiff's counsel that this money belonged to the father, and that his being indebted at that time constituted it a trust fund for the benefit of his creditors, and, this being so, the conveyance, as to that part of the consideration, was voluntary. This must depend upon whether Baisley had in good faith emancipated his sons before they earned the money.

1. A conveyance of lands without a valuable consideration, by one who is indebted at the time, is presumptively a fraud upon his creditors, who have an equitable right to set it aside or to avoid it, at least to the extent of the debts due them: *Elfelt v. Hinch*, 5 Or. 255; *Davis v. Davis*, 20 Or. 78; *Sterry v. Arden*, 1 Johns. Ch. 261.

It being the duty of an infant to labor for his parent in consideration of the latter's furnishing him maintenance and education, it has been held that a deed of land executed by an insolvent parent to his infant child in consideration of services rendered or to be rendered during his minority is voluntary,

and void as to creditors of the grantor: *Swartz v. Hazlett*, 8 Cal. 118; *Stumbaugh v. Anderson*, 46 Kan. 541, 26 Am. St. Rep. 121. A ²⁷² father, who was insolvent, having made a deed to his minor son in consideration of wages earned and a note executed by him, it was held that the conveyance was voluntary, and void as to the grantor's creditors: *Winchester v. Reid*, 53 N. C. 377. In *Bell v. Hallenback*, Wright, 752, it is held that if a father, who at the time is indebted, invests the earnings of the minor children in real estate, and takes the title in their names, the premises will be charged with the debts he then owed. In *Jolly v. Kyle*, 27 Or. 95, it is said: "Conveyances from one relative to another, when attacked by the creditors of the grantor, will always be closely scrutinized, for, from the very relation of the parties, it is scarcely to be supposed that the circumstances and intention of the grantor were not known to the grantee." To the same effect see, also, *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664; *Shober v. Wheeler*, 113 N. C. 370.

2. Where, however, the parent has in good faith emancipated his minor child, and relinquished all right to his earnings, his creditors cannot reach earnings thereafter acquired by such minor to apply them in payment of the parent's debts: 17 Am. & Eng. Ency. of Law, 1st ed., 379. In *Jenney v. Alden*, 12 Mass. 375, a father, who was in good financial circumstances, having agreed that his minor son should have the benefit of his own wages, the latter sent his earnings from time to time to his father, who invested them in real property, taking the title in his son's name; and the father thereafter becoming insolvent, it was held that the property was not liable for the payment of his debts. In *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386, it is held that a father, acting in good faith, may make a valid gift to his minor son of his time and future earnings, although insolvent at the time. In *Clemens v. Brillhart*, 17 Neb. 335, ²⁷³ Mr. Justice Maxwell says: "Creditors have no vested rights in the future earnings of the minor children of the debtor." "A son," says Mr. Justice Black in *McCloskey v. Cyphert*, 27 Pa. St. 220, "is bound to render obedience to his father until he is twenty-one years of age. The father may employ him about his own business without paying him wages, or hire him out, and appropriate his earnings, if he sees fit. But he may also let him go free from his service whenever he chooses. If he happens to be in debt, he is not bound to work his son or daughter as he would work a

horse or slave for the benefit of his creditors." To the effect that the right of a parent to the labor of his child during its minority is personal, and that, though insolvent at the time, he may, for the best interest of the child, emancipate him, and, as a consequence, place his earnings beyond the reach of his creditors, see *Donegan v. Davis*, 66 Ala. 362; *Shortel v. Young*, 23 Neb. 408; *Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567; *Wambold v. Vick*, 50 Wis. 456; *Lackman v. Wood*, 25 Cal. 147; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115.

3. A writing is unnecessary to evidence the emancipation of an infant, it having been held that his liberation may be established by direct evidence or implied from circumstances: *Wood on Master and Servant*, sec. 25; *Dierker v. Hess*, 54 Mo. 246; *Monaghan v. School Dist.*, 38 Wis. 100; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115. Nor is it necessary that the infant should abandon his home, or turn his parent out of doors, to afford proof of the latter's relinquishment of his earnings. "The emancipation of the son from the father's control," says Mr. Justice Black, in *McCloskey v. Cyphert*, 27 Pa. St. 220, "may be as perfect when they both live together²⁷⁴ under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not less absolute because other family ties continue unbroken, and the son's security in his rights of property would not be at all increased by turning his father out of doors." To the same effect, see *Donegan v. Davis*, 66 Ala. 362; *Johnson v. Silsbee*, 49 N. H. 543; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478; *Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567.

4. Considering the facts of the case at bar in the light of these decisions, we think the evidence shows that Baisley in good faith emancipated his sons while he was in good financial circumstances, and that they thereafter earned the money which they loaned to him, and which formed a part of the consideration for the deed. The books of the Baker City National Bank, being offered in evidence, showed that Perry had deposited money in said bank from time to time, until his account exceeded five hundred dollars, against which he drew for that amount, and loaned it to his father, who had not repaid the same when the deed was executed. The evidence of the manner in which J. H. Baisley earned the money which he loaned to his father is not so clear; but, the sum being small, it was probably not considered so important. No testimony was introduced by the plaintiff, however, tending to show that he

had not earned or loaned it. S. B. Baisley, being indebted to his sons on a bona fide claim in the sums named, though also indebted to others at the time, had a right to prefer them if he did not reserve to himself some secret benefit (*Jolly v. Kyle*, 27 Or. 95), and we think there is no evidence tending to show that such was the case. True, he exchanged labor with them, and helped them to make hay on a part of the land conveyed, performing about one and one-half months' work for them in four years, but the evidence fails to show that ²⁷⁵ he derived any secret benefit therefrom, and it must be inferred that the sons' labor for him in return was an adequate compensation therefor.

The lower court found that at the time of the conveyance the lots in Baker City were worth from two thousand dollars to two thousand five hundred dollars, and that the other land was worth nine dollars per acre. There being three hundred and eighty-eight acres of the latter, if the value of the lots be estimated at two thousand five hundred dollars, the aggregate value of the property conveyed would be five thousand nine hundred and ninety-two dollars. While there is some conflict in the testimony as to the value of the land on December 1, 1894, we think the court found the full value thereof, considering the great financial depression prevailing at that time. It will be remembered that in 1896 the receiver of the Baker City National Bank released a second mortgage on the east half of section 35, relinquishing the sum of seven hundred and fifty-seven dollars and fifty-eight cents. This tract was then subject to the Lombard Investment Company's prior mortgage of two thousand dollars, and from the satisfaction of the second mortgage it must be inferred that the receiver considered it of no greater value than the amount of such prior encumbrance, or six dollars and twenty-five cents per acre. The evidence also shows that this tract is the most valuable portion of the whole premises conveyed. S. B. Baisley was the owner of a dower interest in the tracts of which he was seised of an undivided one-tenth interest, but, the person for whose life he held such estate having died soon after the conveyance to his sons, the value thereof is not computed; but, if it were, we nevertheless think that an adequate consideration was paid for the conveyance, and hence it follows that the decree is affirmed.

A VOLUNTARY CONVEYANCE IS PRESUMED to be fraudulent as against existing creditors: *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85.

AN INSOLVENT FATHER MAY EMANCIPATE his son, and the latter's earnings then belong to him free from the claim of the father's creditors: *Trapnell v. Conklyn*, 37 W. Va. 242, 38 Am. St. Rep. 30. But a conveyance by a father to his son in consideration of the earnings of the son while an unemancipated minor is fraudulent as against the father's creditors: *Halliday v. Miller*, 29 W. Va. 424, 6 Am. St. Rep. 653.

THE EMANCIPATION OF A CHILD may be in parol or in writing, or it may be inferred from circumstances: *Halliday v. Miller*, 29 W. Va. 424, 6 Am. St. Rep. 653.

KLAMATH FALLS v. SACHS.

[35 OREGON, 325.]

MUNICIPAL CORPORATIONS—BONDS—ISSUANCE BY TRUSTEES.—Where a town is authorized by its charter to issue bonds for a certain purpose, its board of trustees may issue such bonds without submitting the question to a vote of the people, since the trustees are agents of the town in the exercise of all powers accorded it by the legislature, and the town acts through them in the transaction of all public business.

MUNICIPAL CORPORATIONS—POWER TO ISSUE NEGOTIABLE BONDS.—The power to "issue bonds" for a specified purpose, given to a municipal corporation by its charter, includes the power to make such bonds negotiable, especially where the charter limits the amount of indebtedness which the municipality may contract, and provides that every warrant showing obligations in excess of such limit should be so indicated on its face.

MUNICIPAL CORPORATIONS—ESTOPPEL TO DENY VALIDITY OF BONDS.—A statement on the face of municipal bonds that they were issued by virtue of a certain ordinance, giving its date and full title, is such a reference thereto as to put persons dealing in them upon inquiry touching the provisions and purpose of the ordinance, and whether it was such a one as had the sanction of the charter in its enactment; and a further recital that the bonds were issued in pursuance of the charter does not estop the municipality from denying their validity, since such recital covers a matter of law only. But a recital in such bonds respecting the existence of specified facts, and the performance of the requisite conditions which are within the province of municipal officers to ascertain and determine, will estop the municipality to assert or maintain anything to the contrary as against the claim of innocent holders.

MUNICIPAL ORDINANCE—BONDS, WHETHER A BONUS.—A municipal ordinance granting a franchise for the construction of waterworks, providing that upon its completion the city shall deliver to the owner bonds for a certain sum, the franchise to extend for a stated period, at the end of which the city shall have the option of purchasing the waterworks, the bonds to be considered a first payment upon the purchase price, and that in the meantime the city shall have an interest in the waterworks to the extent of the amount of the bonds delivered to the owner, is not invalid as providing for the delivery of the bonds as a bonus.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—PURCHASING WATER SYSTEM.—Under a charter which limits the debt of a municipal corporation to a certain sum, but which authorizes the incurring of an additional indebtedness of a stated amount by issuing bonds for the purpose of furnishing a water system, the amount of the bonds is not a limitation upon the cost of the water system.

MUNICIPAL CORPORATIONS—FURNISHING WATER SYSTEM.—Under a charter authorizing a city to issue bonds for the purpose of furnishing itself with a water system, the municipality acts within its powers by entering into a contract, executory in its nature, looking to the future acquirement of a water system, even though by such contract it does not become the present absolute owner of such system.

MUNICIPAL CORPORATIONS—CHARTER—WATER AND LIGHTING SYSTEM.—Where a municipal charter provides that a city may issue bonds "for the purpose of lighting the town and furnishing it with a water system," the city is not required both to provide for lighting the town and at the same time to furnish it with a water system, but it may, in its discretion, provide for either system or for both.

Suit by the town of Klamath Falls to enjoin the prosecution of an action commenced by Sachs against the town to recover upon two coupons for interest payments upon bonds purporting to have been issued by it to H. V. Gates, to restrain the collection of such coupons, and to have the bonds declared null and void. Decree for the defendants. Plaintiffs appeal.

Austin S. Hammond, for the appellant.

Charles A. Cogswell, for the respondent.

335 WOLVERTON, C. J. It is alleged that at the date of the signing and sealing of said bonds they were delivered to the defendant E. R. Reames (who was then a member of the board of trustees of the town, and a stockholder in the Klamath Falls Light and Water Company), in trust, to carry out the provisions of said ordinance No. 46, and not otherwise; that neither Gates nor his assigns ever became entitled, under the provisions of said ordinance, to receive said bonds, and that the delivery thereof to Gates was unauthorized by any act of said board. At the trial, however, it was admitted in open court that they were delivered to him by Reames; that he sold the same, but failed to account to the town for the proceeds; and that the defendant Lipman Sachs purchased said interest warrants or coupons for a valuable consideration, before maturity, without knowledge of the conditions and circumstances under which they were issued, delivered, and negotiated, except such as he is bound to take cognizance of from the face of the bonds.

1. It is first insisted that the powers vested in the town by the charter must be distinguished from such as are vested in the board of trustees, and that in the one case they must be exercised by the inhabitants and in the other by the board. To illustrate: It is enacted that the "town may incur an additional indebtedness of ten thousand dollars and issue bonds therefor, for the purpose of lighting the town and furnishing it with a water system"; while, on the other hand, the board is authorized "to provide for lighting the streets, roads, ³³⁶ and alleys, and public buildings of the town, and furnishing the town with electric or other lights, and also to provide for the furnishing of water for the said town," etc. It is maintained that, as the inhabitants were incorporated as the town, they alone can exercise the power delegated by the former clause of the charter, while it is competent for the board to exercise such as is delegated by the latter. Reasoning from this hypothesis, it is urged that the board should have called an election, and submitted the question of the issuance of these bonds to a vote of the electors of the town. This concedes, for the present purpose, that the town is authorized to issue the bonds in question, but challenges the mode and manner of their issuance. The conclusion reached is hardly a logical deduction from the premises. The electors of the town do not comprehend all the inhabitants thereof, and just why the board of trustees should be required to submit the question to a vote of the electors because the inhabitants of the town are incorporated is not quite apparent. There is no authority or direction under the charter empowering or requiring the board, before proceeding to the issuance of the bonds, to submit the question to a vote of the people; nor is there any such a limitation put upon its powers as it respects the issuance thereof. It is very true the trustees, if they had seen fit, could have submitted the question to a vote of the electors as an advisory matter for their guidance, but they were not compelled or required to so by any provision of the charter. They are the agents of the town in the exercise of all powers accorded it by the legislature, and the town acts through them in the transaction of all public business. A corporation, unlike an individual, cannot perform its functions directly, but must do so through an agent or some intermediary instrumentality; and it is in this capacity that the board of trustees ³³⁷ acted in the issuance of the bonds in controversy. If, therefore, the

town has been clothed with the power to issue, the board has authority to proceed in the exercise thereof.

2. It is next insisted that the language of the charter does not authorize or empower the town or its board of trustees to issue bonds negotiable in form and character, such as were attempted to be issued in the present instance; in other words, that the power accorded to "issue bonds" is not commensurate or adequate to the purpose of issuing negotiable bonds. It has been held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it does not authorize the municipality to issue negotiable securities, capable of being sold in open market, and thereby freed from equities that might be set up by the maker; and, further, that the power to borrow money on the credit of the municipality for general municipal purposes limits the power to borrow for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation, the presumption being that the grant of power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and that there is no implied power to issue negotiable securities, unimpeachable in the hands of innocent purchasers, for the money borrowed: *Merrill v. Monticello*, 138 U. S. 673; *Brenham v. German-American Bank*, 144 U. S. 173. So, in *Ashuelot Nat. Bank v. School Dist. No. 7*, 56 Fed. Rep. 197, it was held that there is no implied power to issue negotiable bonds from the express delegation of power and authority to borrow money to pay for the site of schoolhouses, to erect buildings ³³⁸ thereon, and furnish the same, dependent upon a majority vote of the qualified electors of the district. And, in *Merrill v. Monticello*, 138 U. S. 673, it is said by Mr. Justice Lamar, speaking for the court, that: "To borrow money, and to give a bond or obligation therefor, which may be circulated in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case, all that can be contended for is that the town had the power to contract a loan under certain specific restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loans. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality." These cases are mainly relied on by plaintiff in support of its

position, and we do not question their soundness, but their application to the present controversy may well be doubted.

In *Cadillac v. Woonsocket Inst. for Savings*, 58 Fed. Rep. 935, under a statute which contains, among others, the following provisions, viz.: "For any loans lawfully made the bonds of the city may be issued, bearing a legal rate of interest. . . . When deemed necessary by the council to extend the time of payment, new bonds may be issued in the place of former bonds falling due, in such manner as merely to change but not increase the indebtedness of the city"—it was held that bonds negotiable in form were authorized. Lurton, J., speaking for the circuit court of appeals, says: "That this contemplates, and by necessary implication authorizes, the issue of negotiable bonds, we have no doubt. The general power to issue 'bonds' must be taken to authorize 'bonds' in the usual form of such well-known ³³⁹ commercial obligations. That usual form embodies a contract and obligation negotiable in its terms." He continues: "The case of *Brenham v. German-American Bank*, 144 U. S. 173, has no bearing upon this question. Nothing more is there decided than that an act empowering the city to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city, did not authorize the issuance of negotiable obligations for the money so borrowed. Here the power to issue obligations, by necessary implication, in the usual commercial form of 'bonds,' is expressly given. But one meaning can be fairly deduced from the terms of the act. The question now presented was not discussed in the *Brenham* case, and we have no doubt whatever as to the conclusion we have announced." The doctrine of this case has been expressly followed in several subsequent decisions by the federal courts, all of which distinguish *Merrill v. Monticello*, 138 U. S. 673, and *Brenham v. German-American Bank*, 144 U. S. 173. In *Ashley v. Board of Supervisors*, 60 Fed. Rep. 55, power was given to issue bonds bearing interest, running for a long period of time; and, it appearing on the face of the act that they might be put on the market and sold, it was held that, by strong implication, bonds negotiable in form were intended to be and might lawfully be issued and sold, under the authority granted. In *West Plains Tp. v. Sage*, 69 Fed. Rep. 943, it was held that a statute providing "that every county, every city of the first, second, and third class, the board of education of any city, every township, and every school district, is hereby authorized and empowered to compromise

and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds, with ³⁴⁰ semi-annual interest coupons attached, in payment for any sums so compromised," by implication authorized the township to issue new bonds, without any restriction as to their negotiability, and that the grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. And in *Howard v. Kiowa County*, 73 Fed. Rep. 406, it was concluded that statutory power to issue bonds includes power to make them negotiable, unless restricted by positive enactment. The learned judge in this case cites with approval the federal authorities above referred to.

The implied power is largely—perhaps exclusively—a matter of legislative intendment, and we are impressed that a reasonable construction of the charter providing for the issuing of these bonds empowers the town, through its board of trustees, to issue and put upon the market bonds negotiable in form, and which would not be subject to equities in favor of the town in the hands of innocent purchasers. It will be noted that the first clause of section 11 of the charter provides that the town shall never borrow money, contract debts, or loan its credit to a greater amount than five per cent of its taxable property, and that all warrants drawn against the town creating an indebtedness in excess of that sum shall be absolutely void, and it shall be so stated upon each and every warrant so drawn. Thus it will be seen that the intendment of the charter is that the ordinary warrants may be issued in liquidation of the town's indebtedness, within the limit designated; but, if it exceeds the limit, then that the warrants shall be invalid, and the fact shall be indicated upon the face thereof, which would impart direct notice and information of their illegality to every person dealing with them. A subsequent clause empowers the town to issue another and a different kind of voucher or obligation ³⁴¹ "for the purpose of lighting the town and furnishing it with a water system." For the additional indebtedness thus incurred it may "issue bonds." Manifestly, a distinction was intended to be made between the two kinds of vouchers or obligations, and it was designed, no doubt, that one should possess more of value to the holder than the other, else why should the different kinds of obligations be designated in the self-same section of the charter? Now, a non-negotiable

bond is no more serviceable to the holder than the ordinary warrant, the usual voucher issued in liquidation of ordinary expenditures of the municipality; and, if we would endow it with an enlarged value, the only manner by which it could be done is to give it negotiability, so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent holders for value; so that, if we must make a distinction, it must be that which distinguishes the ordinary warrant, or non-negotiable, from the negotiable municipal bond, which cuts off equities. We conclude, therefore, that the bonds authorized by the charter are those possessing the greater commercial value, issued in the usual commercial form, with protection to innocent purchasers. Thayer, J., who rendered the opinion in *Ashuelot Nat. Bank v. School Dist. No. 7*, 56 Fed. Rep. 197, wrote a concurring opinion in *West Plains Tp. v. Sage*, 69 Fed. Rep. 943, basing the power to issue the negotiable form and quality of bonds upon a construction of the statute, wherein, considering the intent of the legislature, he concluded that the language of the act was adequate to the purpose, notwithstanding the decisions in *Merrill v. Monticello*, 138 U. S. 673, and *Brenham v. German-American Bank*, 144 U. S. 173. To the same purpose is *Ashley v. Board of Supervisors*, ³⁴² 60 Fed. Rep. 55. So it is in the case at bar. The character of the bonds authorized to be issued is established by legislative intendment, and it was competent to give them the quality of negotiability.

3. The bonds having recited that they were issued in pursuance of the provisions of the charter and ordinance No. 46, it is vigorously contended that the purchaser is bound to take cognizance of the provisions both of the charter and the ordinance, and, in that view, it is further maintained that the ordinance is such as the board of trustees had no warrant, under the charter, to adopt, in that it does not provide for lighting the town and furnishing it with a water system; hence, that the bonds were issued for a purpose not contemplated by the charter, and therefore void in the hands of all holders thereof. Answering these propositions, defendants assert that, the charter having invested the board of trustees with power to issue bonds, and the bonds themselves bearing upon their face recitals to the effect that they were issued by authority of the charter and ordinance No. 46, and that all acts and things required to be done precedent to and on the issuance thereof

have been done and performed in regular and due manner and form, as required by law, the town is effectually estopped to controvert the truth of such recitals as against a bona fide holder. In legal effect, adequate recitals contained in negotiable municipal bonds are equivalent to a representation, or warranty, or certificate on the part of the officers, that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make them legal and binding. It is well understood, of course, that such recitals do not cover matters of law, as all parties are equally bound to know the law, so that a certificate reciting actual facts, and that thereby the bonds were conformable to law, when, judicially speaking, they ³⁴³ are not, does not work an estoppel upon the municipality to claim the protection of the law; otherwise, it would be in the power of every municipal body, whether it had the authority or not, to usurp it by declaring that its assumption was within the law. This would be an exercise of legislative power, and would put corporate bodies above the law itself. The estoppel, therefore, extends only to matters of fact, and the statement thereof must be qualified and circumscribed so as to comprise such only as the officers intrusted with the power of issuing the bonds have express or implied authority to ascertain and determine touching their existence. In such a case, Mr. Justice Matthews, in *Dixon County v. Field*, 111 U. S. 83, says: "The meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained or determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency."

The gist of the rule is aptly stated by Mr. Justice Strong, in *Coloma v. Eaves*, 92 U. S. 484, as follows: "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent had been complied with, their recital that it has been, made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." Hence it may be stated, as a general rule, that recitals in bonds which functionaries of a municipality have been empowered to issue, respecting the existence of specified facts, and the performance of the

requisite conditions which are within their appropriate functions or province to ³⁴⁴ascertain and determine, will estop the municipality to assert or maintain anything to the contrary as against the claim of innocent holders. We have little doubt but that the statement on the face of the bonds that they were issued by virtue of ordinance No. 46, giving the date and the full title of such ordinance, is such an apposite and significant reference thereto as to put persons dealing in them upon inquiry touching the provisions and exact legal purpose of the ordinance, and whether it was such a one as had the sanction of the charter in its enactment. The trend of authority, so far as we have been able to discover, is to that effect: *Risley v. Howell*, 57 Fed. Rep. 544; *Hackett v. Ottawa*, 99 U. S. 86; *Barnett v. Denison*, 145 U. S. 135. Such being the legal effect of the statement or reference to the ordinance, the recital that the bonds were issued in pursuance of the charter could not validate it, or give it effect, if void or inoperative. This would be equivalent to saying: "Indeed, you have given us the true condition of the ordinance, and it is such that the town had no authority to adopt; but, nevertheless, you assert upon the face of the bonds that all was done in pursuance of the charter, hence that we are at liberty to assume, in utter disregard of the truth, that an ordinance was not only adopted, but that, in legal contemplation, it was amply sufficient to authorize and support the bonds, and that we may, therefore, purchase in absolute reliance on their validity." That would be an anomaly, and would result in making a void ordinance, of the condition of which all parties have had ample notice, valid, by the simple assertion that it was adopted in accordance with law.

4. This brings us to a consideration of the ordinance itself, and we are to determine whether it is such a one as the board of trustees was empowered to adopt, and such ³⁴⁵as will support the bond issue. It is urged that the bonds awarded are, in effect, a bonus to be paid to Gates for constructing the water system and supplying the town with water. A careful analysis of the ordinance will suffice to determine this question. In the first place, the town grants to Gates, his successors or assigns, a privilege to construct and maintain a system of waterworks for supplying it and its inhabitants with water. Primarily, this privilege is limited to ten years. Gates, by an acceptance of the ordinance, agrees and undertakes to build, construct, and

maintain the system in accordance with particular provisions of the ordinance, and is required to maintain it during the full period for which the privilege is granted. Thereupon it is provided that the town shall have the option to purchase the system at a certain fixed rate, capable of being definitely determined at any time it may desire to conclude the purchase. In consideration of the option, it is stipulated that the town shall execute and deliver to Gates its bonds for the sum of ten thousand dollars, and, whenever it shall conclude the purchase, these bonds are to be considered a first payment upon the purchase price. The ordinance provides that the town shall have an interest in the waterworks to the extent of ten thousand dollars, but that Gates and his successors and assigns shall also retain an interest therein until the town has completed the purchase, upon the consummation of which the franchise shall terminate. Gates is to receive the rents and profits of the water service to the inhabitants, and even to the town, except for ten hydrants, which he is required to furnish and maintain in part consideration for the franchise until the same is terminated; and provision is made for the renewal of the franchise, which contemplates as well a renewal of the option from time to time for a period of five years, so that the parties shall be continued in practically the ³⁴⁶ same relations. These are, in brief, the principal characteristics of the ordinance, which became effective as a contract when accepted by the grantee in the manner indicated. Whatever might be said of the ordinance, it does not provide for a bonus to Gates, in the sense that it is a mere gratuity, as he has contracted for and has given something of value to the town in return for the bonds and his limited franchise.

5. But the cardinal inquiry is whether what has been done has culminated in furnishing the town with a water system, within the meaning of section 11 of the charter. It is argued that it was the purpose and intent of the charter that the town should be or become the absolute owner of a perfect water system, freed from all liens, or encumbrances which may have effect as such, either directly or indirectly; in other words, that the town is empowered merely to purchase and own a perfect, unencumbered water system, at a cost not to exceed ten thousand dollars. The effect of section 11 is that the town shall not create an indebtedness exceeding five per cent of the taxable property; but, for the purpose of lighting the town and

furnishing it with a water system, it is authorized to incur an additional indebtedness of ten thousand dollars, which latter amount we interpret not to constitute a limitation upon the cost of the water system; and it would be adequate for the town to contract or provide for the construction of a system which might cost a sum equal to five per cent of the taxable property in excess thereof, provided there was no other indebtedness of the town, and it could issue therefor ten thousand dollars in bonds, and its warrants for the balance. Thus far the way seems perfectly clear. It must be admitted that the town has not become the absolute owner of the water system; but it has an interest therein to the extent of ten thousand dollars, and, under the ordinance, it may retain this at all events, and may eventually ³⁴⁷ become the owner of the whole by a supposed additional expenditure. We find from the testimony that the entire system, including the electric light plant, cost Gates something like seventeen thousand dollars. But this is not the measure of the ultimate cost to the town. It may be more, and yet it may be less. The assessments of taxable property in 1895 exceeded one hundred and twenty-five thousand dollars, so that, if the board had incurred a liability or obligation to the full amount of the cost to Gates, it would exceed but slightly the limitation under the charter, unless the town had other outstanding obligations. The board, however, has only incurred a present obligation of ten thousand dollars, and at the end of ten years it is quite probable it can assume the additional obligation, if it does not provide a fund in the meantime for the payment of the bonds in full or in part, without overreaching the charter limitation of indebtedness. Careful provisions are made whereby the town may eventually own the system, and it would seem that the legitimate intendment of the ordinance is that the contract thereby consummated with the assent of Gates should, in good faith, be carried out in every detail, and fully and conscientiously executed. The ordinance has so provided that neither Gates nor his successors or assigns can ever acquire the absolute franchise without the assent of the town (and without the franchise they could not operate the system); nor can the town be deprived of its right to finally acquire the entire ownership of the system without an abandonment thereof. The town entered bona fide into a contract, and we cannot say that it is unreasonable or unbusinesslike, for that is largely a legislative matter for the board of

trustees, whereby, upon the observance of its terms and conditions, it might eventually acquire the water system, and, apparently, without the necessity of exceeding the limit of indebtedness as set by the charter; and we are very ³⁴⁸ strongly impressed that it is such a one as the board had the power to make, looking to the acquirement of the water system, and, while it is yet executory in its nature, and the town has not become the absolute owner, such is the legitimate intendment that it shall at a future date become such owner; hence, we hold that it has not exceeded its powers in the premises.

6. We have reasoned this case so far as if the board of trustees had been dealing with the water system alone, because it has seemed that we might be better understood. The plaintiff argued that it was necessary, under the charter, that the board should provide for lighting the town, and at the same time furnish it with a water system, thus combining the two, and that it was incompetent for the town to provide for the one without the other. This argument is not well founded, as it is apparent that the intendment of the charter is that the board might provide for one or the other separately, or for both at the same time; but, if we are wrong in this interpretation, we find that the board has in fact undertaken to provide for a combination of both. While the ordinance providing for the lighting of the town is not referred to in the bonds, yet the matter of constructing an electric system in conjunction with the waterworks is referred to in ordinance No. 46 in such manner as it may be fairly concluded that the purpose of the board was to furnish the town with a system for lighting, as well as for a water supply. Ordinance No. 46 being, as we have heretofore ascertained, within the power of the board of trustees to enact, the town is estopped by the recital in the bonds to the effect that all acts and things required to be done precedent to and on the issuance thereof have been done and performed in regular and due manner and form, as required by law, to deny that Gates ³⁴⁹ or his assigns have not complied with the terms and conditions of his undertaking, or that he has not fully completed the system, as required by the ordinance.

The issue is raised that the bonds were delivered without the authority of the board of trustees. But touching this there is no evidence in the record showing the manner of their delivery by Reames. The complaint alleges no fraud in the delivery, but simply that the bonds were turned over to Gates contrary

to the conditions of the ordinance. But the burden of proof regarding this matter was with the plaintiff to establish, and, not having done so, we must conclude that the fact is otherwise than as alleged, and that the bonds came rightfully into the hands of Gates. These considerations affirm the decree of the court below, and it is so ordered.

THE IMPLIED POWER OF A MUNICIPALITY TO ISSUE NEGOTIABLE OBLIGATIONS is treated in the monographic note to *Jones v. Camden*, 51 Am. St. Rep. 830, 831. Officers of a city have no power to issue negotiable paper for claims and demands against the city when they have no express authority: *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423.

ESTOPPEL TO DENY THE VALIDITY OF MUNICIPAL BONDS is discussed in the monographic notes to *Beard v. Hopkinsville*, 44 Am. St. Rep. 242; *Jones v. Camden*, 51 Am. St. Rep. 856-859. This latter note, pages 822-861, treats of bona fide ownership of municipal bonds generally.

LIMITATION UPON MUNICIPAL INDEBTEDNESS is discussed in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243.

NOTTAGE *v.* PORTLAND.

[35 OREGON, 539.]

CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION. Unless restricted by the state constitution, the legislature may validate retrospectively a proceeding for the improvement of a street which it might have authorized in advance, and it may cure defects in, or make immaterial, statutory requirements which it could have dispensed with in the first instance.

CONSTITUTIONAL LAW—CURATIVE ACT—INVALID PETITION.—The legislature may, by a curative act, validate proceedings for the improvement of a street which are invalid because the petition therefor did not have the requisite number of signers, since it might have dispensed with such petition in the first instance.

STATUTES—SUBJECT MATTER GERMANE TO TITLE.—A section of a statute providing for the ratifying and validating of prior proceedings for street improvements is germane to the subject matter of the statute, the title to which is "An act to incorporate the city of Portland and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith."

STATUTES—CONSTRUCTION.—A CURATIVE ACT, designed to validate prior proceedings for street improvements, and which authorizes an action by the city against the owner of property defectively assessed, is available as a defense against an action to recover money already paid under an invalid assessment.

CONSTITUTIONAL LAW—ASSESSMENT—DUE PROCESS OF LAW—NOTICE.—A curative statute validating assessment pro-

ceedings, which determines absolutely the amount of the tax to be raised and the lots of land among which it is to be apportioned, is not unconstitutional as depriving a party of his property without due process of law, where, at the time the assessment was made, the property owner had notice and an opportunity to be heard as to the amount to be charged against his property.

CONSTITUTIONAL LAW—VESTED RIGHTS.—WHERE A TAX IS PAID TO A CITY UNDER PROTEST, the taxpayer has no vested right of action to recover the amount paid on the invalid assessment, where such right is based upon an informality in the assessment proceedings, since a party has no vested right in a defense or right of action based upon an informality not affecting his substantial equity.

CONSTITUTIONAL LAW—CURATIVE ACT—USURPING JUDICIAL AUTHORITY.—A statute which authorizes a city to bring an action against property owners to recover assessments, notwithstanding any irregularity or defect in the assessment proceedings, is not unconstitutional as being a usurpation of judicial authority by the legislature because it may overturn decisions of the courts, but is a curative act, though it does not use the words "ratify," "confirm," or "validate."

CONSTITUTIONAL LAW—CURATIVE ACT.—THE LEGISLATURE cannot, by a curative act, impose new duties or obligations. Hence, a statute which authorizes a city to bring an action against a property owner to recover the proportion of the cost of an improvement, and which also provides for a lien upon the premises liable for such improvement, is not unconstitutional as imposing a personal obligation upon the property owner not provided for in the charter of the city in force at the time of such improvement, since the act authorizes the recovery of a judgment against the property owner, to be enforced only against the property liable for such improvement.

Action by plaintiff against the city of Portland to recover three hundred and eight dollars and sixty-three cents, paid under an assessment levied upon her property. It was admitted that the assessment was invalid, but the defense was that the defect in the assessment proceedings had been cured by the new city charter of 1898, which provided that if any assessments levied by the city should be invalid for any reason the city should have power to bring an action against the owners of land upon which the cost of the improvement could be charged. The charter further provided that "if any assessment heretofore made or levied by the city for street improvement, repair of a street when the cost thereof has been declared by the common council to be a charge upon the adjacent property, . . . shall have been or shall hereafter be found, declared, or adjudged to be invalid or uncollectible for any reason, . . . the city shall have power to bring actions" against property owners to recover the proportion of the cost of the improvement.

Joel M. Long, city attorney, and Ralph R. Duniway, for the appellant.

Greenbury W. Allen and Fred M. Mulky, for the respondent.

547 BEAN, J. 1. We shall notice the second defense only, for, in our opinion, it is decisive of the case. Statutes in one form or another designed to cure defects or irregularities in proceedings for the improvement of streets in municipalities are of frequent occurrence, and have often been the subject of judicial consideration. The right of a municipality to improve a street at the expense of the abutting property rests for its legality wholly upon the provisions of its charter, and, as such provisions are the measure and mode of its power, any substantial deviation therefrom 548 is without right or authority, and, in the absence of a curative statute, will render proceedings void when in many instances no one has been injured by the mistake or omission, and the property owner has received the benefit of the improvement. The courts are, therefore, disposed to regard with favor legislation having for its object the validation of such proceedings, and to uphold such legislation when it does not impair vested rights, or provide for taking property without due process of law. And it may be regarded as settled that the legislature may, unless restricted by the state constitution, legalize or validate retrospectively a proceeding for the improvement of a street which it might have authorized in advance, and it may also cure defects in or make immaterial statutory requirements which it could have dispensed with in the first instance: Elliott on Roads and Streets, 424; 1 Dillon on Municipal Corporations, sec. 79; Cooley on Taxation, 305; Cooley's Constitutional Limitations, 457; note to *People v. Seymour*, 76 Am. Dec. 527. A reference to a few of the decided cases will illustrate the application of this doctrine.

2. In *Mattingly v. District of Columbia*, 97 U. S. 687, the board of public works caused a street in the city of Washington to be improved, and, after the completion of the work, made an assessment of one-third of its cost upon the property adjoining, under a very vague and indefinite grant of power, proportioning it according to the frontage. The property holders along the line of the street brought a bill for an injunction against the collection of the assessment on the grounds: 1. That the board was not authorized by law to make the improvement;

2. That no law existed at the time prescribing the manner in which the board should make assessments; 3. That assessments according to the frontage on the street were unauthorized and illegal; and 4. That in making the assessment certain property had been ⁵⁴⁹omitted. But the court refused to inquire whether the charges of the bill were well founded, saying: "Such an inquiry can have no bearing upon the case as it now stands; for, were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been congressional legislation since 1872, the effect of which upon the assessment is controlling. There were also acts of the legislative assembly of the district which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized; and the ratification, if made, was equivalent to an original authority. Under the constitution, Congress had power to exercise exclusive legislation in all cases whatsoever over the district, and this includes the power of taxation. Congress may legislate within the district respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may, therefore, cure irregularities, and confirm proceedings, which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights." The court then proceeds to examine the question whether the assessments had been confirmed and ratified by subsequent acts of the legislative assembly of the District of Columbia and of Congress, ⁵⁵⁰and, concluding that they had been so ratified, held them valid, and affirmed the judgment of the court below dismissing the bill.

Again, after the proceedings of the board of commissioners of one of the counties of Indiana in the matter of the construction of a graveled road at the expense of the property benefited

had been held invalid by the court because the initiatory steps were taken at a special and not a regular session of the commissioners, the legislature passed an act in terms legalizing and declaring valid such proceedings and the assessments and charges made for the construction of such road, and this act was held valid in *Johnson v. Board of Commrs. etc.*, 107 Ind. 15, the court saying: "It is settled by our decisions and the authorities elsewhere that curative or retrospective statutes may cure defects and irregularities in proceedings, even though the defects and irregularities are so flagrant as to render the proceedings, for all practical and enforceable purposes, null and void." *Tift v. Buffalo*, 82 N. Y. 204, was an action brought to set aside an assessment upon the premises of plaintiff for repairs of a street in the city of Buffalo, which was admittedly invalid on account of a failure to comply with the requirements of the city charter, but it was held that the defect was cured by a subsequent act of the legislature to legalize such proceedings, and that it was no objection that it deprived the plaintiff of a defense against the collection of such assessment on the ground of informality, the court saying: "Again, the legislature has the power, to a certain extent, of retrospective legislation. It is not an unlawful exercise of this power to take away defenses based on mere informalities. A party has no vested right in a defense based upon an informality not affecting his substantial equities. The legislature may change or modify the effect of prior ⁵⁵¹ transactions in cases where retrospective legislation is not forbidden by the fundamental law. Such legislation has been held to be lawfully directed to the cure of irregularities in an assessment of property for taxation and the levy of taxes thereon." In *Richman v. Supervisors etc.*, 77 Iowa, 513, 14 Am. St. Rep. 308, an act of the legislature was held valid which legalized proceedings in the construction of a levee and the assessment of the cost therefor against land supposed to be benefited, which had theretofore been held void by the supreme court for want of jurisdiction because "a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting point, route, and termini," as provided by the statute in such cases.

In *Whitney v. Pittsburg*, 147 Pa. St. 351, 30 Am. St. Rep. 740, it was held that a defect in proceedings for the improvement of a street because it was not made upon a petition of the

owners of a majority in interest of the property abutting on the street, as required by the statute, was cured and rendered immaterial by a subsequent act of the legislature, the court saying: "Assuming these objections to be well taken, we are of opinion that the act of 1891 is broad enough in its terms to cure these defects. The most that can be said is that the work referred to was done without lawful authority, and this is the defect which the act was intended to cure": See, also, *Donley v. Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738; *May v. Holdridge*, 23 Wis. 93; *Dill v. Roberts*, 30 Wis. 178; *In re Van Antwerp*, 56 N. Y. 261; *Brown v. Mayor etc.*, 63 N. Y. 239; *Clinton v. Walliker*, 98 Iowa, 655; ⁵⁵² *Brevoort v. Detroit*, 24 Mich. 322; *State v. Ballard*, 16 Wash. 418; *Shuttuck v. Smith*, 6 N. Dak. 56. From the doctrine of these cases it is quite apparent that it is within the power of the legislature to cure retrospectively proceedings for the improvement of a street because the petition therefor did not have the requisite number of signers, since the legislature might have dispensed with such petition in the first instance, and authorized and empowered the municipality to initiate the proceeding for the improvement without any petition whatever. And as this is the defect claimed in the case at bar, it only remains to notice some of the specific objections made to the application and validity of section 156.

3. First it is claimed that the section is void because the subject matter thereof is not expressed in the title of the act. The act of which the section is a part is entitled "An act to incorporate the city of Portland, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," and we think, in view of the fact that it was but a reincorporation of a previously existing municipality, the matter of ratifying and validating prior proceedings for the improvement of streets is germane to the subject matter of the title, and properly included in the act.

4. It is next claimed that it does not apply to the case at bar, because by its terms it simply authorizes an action by the city against the owner of property defectively assessed, and therefore, it is argued, cannot be used as a defense against an action to recover money already paid under an invalid assessment. But this position is wholly at variance with the evident purpose and object of the legislature, and would, if sustained, sacrifice the spirit of the statute to its mere form. It ⁵⁵³ was designed

to enable the city to collect from the property benefited a proportionate share of the cost of improving the street in front thereof, notwithstanding any irregularities or defects in the proceedings for such improvement, and, in our opinion, may be used as a defense to an action by a property owner for the return of the money paid on his assessment on account of a defect or irregularity in the proceedings, as well as in affirmative actions for such cost by the city. In the former case, the answer of the city setting up the statute as a defense is, for all practical purposes, equivalent to the bringing of an action within the meaning of the statute. If the plaintiff should be permitted to prevail, and recover the money heretofore paid on account of the defective assessment, the city would, under this statute, have a right to immediately bring an action against her to recover the money back; and, since the plaintiff has already paid the amount, there can be no reasonable objection to the city using the statute as a defense against an action to recover it.

5. It is also contended that the section prescribes the amount of the judgment to be entered in actions authorized by it without giving the property owner an opportunity to be heard as to the validity or amount of the tax to be raised, and is, therefore, unconstitutional and void. The language of the statute is not entirely clear, it being susceptible of two possible constructions—either that it fixes the recovery at the amount previously assessed against the particular parcel of property, or at “the proportion of the cost of such improvement properly chargeable to such parcel or lot of land.” But, under either view, the objection made is not well taken in this case, because it is within the power of the legislature to determine absolutely the amount of tax to be raised, and the lots or parcels of land among which it ⁵⁵⁴ is to be apportioned, and the plaintiff has no constitutional right to be heard upon either of these points. That question was litigated and settled in the leading case of *Spencer v. Merchant*, 100 N. Y. 585; 125 U. S. 345. In that case, after an assessment for grading and improving a street at the expense of the property benefited had been held to be invalid by the court of appeals of New York (*Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289), and after some of the assessments had been paid, the legislature passed an act directing the supervisors of the proper county to levy and collect from the delinquent property the unpaid portion of the cost of such

improvement, with interest thereon, first giving notice, by publication, of the time and place when they would meet to make such apportionment; and this act was held constitutional and valid by the court of appeals of New York and the supreme court of the United States, notwithstanding the fact that it determined absolutely and conclusively the amount of the tax to be raised, and the property to be assessed, and upon which it was to be apportioned; the court holding that under the provision for notice to and a hearing of each proprietor upon the question of what proportion of the tax should be assessed upon his land there was no taking of his property without due process of law. In the case at bar no objection is made to the validity of the original assessment on account of want of notice, so that, if section 156 is to be construed as fixing the amount of the judgment to be recovered at the amount of the prior invalid assessment, the plaintiff will not be deprived of her property without due process of law, because she had notice, and an opportunity to be heard, at the time the assessment was made, as to the amount to be charged against her property.

6. Again, it is claimed that when the plaintiff paid ⁵⁵⁵ the assessment by coercion and under protest the law created an implied contract on the part of the city to return it to her if wrongfully collected, and that the section in question is, therefore, void, because it impairs the obligation of such contract, and deprives her of a vested right of action. But there was no contract on the part of the city to return the amount of the invalid assessment paid by the plaintiff. Her right to recover was based upon an informality in the proceeding, and the legislature may lawfully take away such right, because a party has no vested right in a defense or right of action based upon an informality not affecting his substantial equity: Cooley's Constitutional Limitations, 454; Tifft v. Buffalo, 82 N. Y. 204. This precise question was determined by the supreme court of Pennsylvania in Grim v. Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237. In that case the plaintiff had paid an illegal tax under protest, and in an action to recover it back the school district set up as a defense the provisions of an act of the legislature legalizing and making valid such tax. It was claimed there, as here, that the act was unconstitutional, because at the time of its passage the plaintiff had a vested right to recover from the district the money which he had been compelled to pay without authority of law, and this vested right the legis-

lature could not divest. But Mr. Justice Sharswood, speaking for the court, said, in answer to this position: "If an act of assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights. There is no clause, either in the constitution of the United States or of this commonwealth, which prohibits retrospective laws. The legislature cannot impair the obligation of a contract, or pass an *ex post facto* law, for both these are expressly forbidden. But an *ex post facto* law is one which makes an act punishable in a ⁵⁵⁶ manner in which it was not punishable when it was committed. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. Retrospective laws and state laws divesting vested rights, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition contained in the constitution of the United States, however repugnant they may be to the principles of sound legislation. . . . All acts curing irregularities in legal proceedings necessarily divest vested rights of the parties by closing the mouths of those who could otherwise avail themselves of such irregularities to escape from the fulfillment of what is a moral obligation, and, but for the irregularity, would be a legal liability. . . . To deny the validity of such laws would be to run the plowshare through hundreds of titles which are founded and repose in security upon them."

7. It is next claimed that the section is in no sense a curative or validating statute, but is in express terms an act overturning past as well as future decisions of the courts, and is a plain usurpation of judicial authority, and therefore - beyond the power of the legislature. But we do not think this position is sound. It is true the section does not, in language, purport to validate or legalize irregularities in proceedings for the improvement of a street, but defects of this character may be cured by implication: *Mattingly v. District of Columbia*, 97 U. S. 687; *Campbell v. Kenosha*, 5 Wall. 194; *Brown v. Mayor etc.*, 63 N. Y. 239; *The Clinton Bridge*, 10 Wall. 454. And when the legislature authorized the city to bring an action against the property owners to recover the amount of the assessments, notwithstanding any irregularity or defect in the proceedings, it necessarily intended to and did render ⁵⁵⁷ immaterial such defects, and it can be no objection to the validity

of the act that it does not use the words "ratify," "confirm," or "validate." Nor does the section in any way undertake to interfere with judicial decisions, or disturb rights acquired thereunder. It cures and attempts to cure defects in proceedings for the improvement of a street theretofore had, and which may in some instances have been declared void by the court on account of such defects, but there is no rule of law or constitutional construction which forbids or prohibits legislation of that kind. Indeed, an examination of the authorities will exhibit the fact that in many instances the paramount object of retrospective curative acts is to obviate the effect of some previous decision of a court declaring the proceedings invalid because of some defect or irregularity. Such is the case in *Spencer v. Merchant*, 100 N. Y. 585, 125 U. S. 345, *Whitney v. Pittsburg*, 147 Pa. St. 351, 30 Am. St. Rep. 740, *Johnson v. Board*, 107 Ind. 15, and many of the other cases cited. It is even no objection to a curative statute that it was passed while a suit was pending, and was intended to cure defective proceedings involved in such suit: *Cooley on Taxation*, 305, note; *Clinton v. Walliker*, 98 Iowa, 655; *People v. Seymour*, 76 Am. Dec. 521, 529.

8. And, finally, it is claimed that the section provides for a personal judgment against the property owner, and that the attempt to cure defects or irregularities in proceedings for the improvement of streets is thereby rendered unconstitutional and void, because it imposes obligations and duties upon the property owner not provided for in the charter of the city in force at the time of such improvement. If this construction of the section is sound, the objection is unquestionably well taken, so far as prior proceedings are concerned, because it is ⁵⁵⁸ not within the power of the legislature, by a curative act, to impose new duties or obligations: *Johnson v. Board of Commrs. etc.*, 107 Ind. 15. But we are of the opinion that, while the language of the section upon this point is somewhat involved, its proper and reasonable construction is that it does not contemplate a personal judgment against the property owner, to be enforced out of his general property. It is true it provides that the city shall have power "to bring actions against the owner or owners of property, and to recover from said owner or owners the proportion of the cost of the improvement," etc., but it is also provided that a lien therefor shall be decreed upon the premises liable or assessed for such improve-

ment, and, in view of the previous policy of the state, as exhibited by its legislation, to confine the enforcement of assessments for the improvement of streets to the abutting property, and the further fact that legislation attempting to make the property owner personally liable would, perhaps, be subject to constitutional objections, we think this section should be construed as authorizing the recovery of a judgment against the property owner, to be enforced only against the property liable for such improvement. It is the duty of the court to sustain legislation of this character when it can be done without impairing the obligations of a contract, or violating some constitutional provision, and therefore the section should be construed so as to render it valid, rather than void.

This disposes of all the objections made to section 156 in this case, and we shall not assume at this time to decide any others. The judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

RETROACTIVE AND CURATIVE STATUTES.—A retroactive statute is valid only when it is remedial and does not impair contracts or divest vested rights: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194. But a person has no vested right to a defense based upon mere informalities not affecting his substantial equities: See the extended note to *People v. Seymour*, 76 Am. Dec. 528. When street improvement work has been done under a void statute, a subsequent statute providing for the levy and collection of assessments to pay for such work is constitutional: *Donley v. Pittsburgh*, 147 Pa. St. 348, 30 Am. St. Rep. 738. See, too, *Richman v. Supervisors*, 77 Iowa, 513, 14 Am. St. Rep. 308. The legislature may cure irregularities and informalities in assessments: See the extended note to *People v. Seymour*, 76 Am. Dec. 533-537, on curative laws.

ON THE SUFFICIENCY OF THE TITLE TO STATUTES, see the exhaustive note to *Bobel v. People*, 64 Am. St. Rep. 70-107.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

WORTH v. NORTON.

[56 SOUTH CAROLINA, 56.]

PROCESS—EXEMPTION FROM SERVICE OF.—The constitutional provision exempting members of Congress from arrest while it is in session, or while they are going to and returning therefrom, does not extend to service of process in a civil action, nor does it exempt them from such service while absent on leave from Congress attending to private business, while it is in session.

Wilcox & Wilcox, for the appellants.

Sellers & Sellers, for the appellee.

63 McIVER, C. J. Being unable to accept the conclusion reached by Mr. Justice Pope in this case, I will proceed to state briefly the grounds of my dissent. The facts of the case are all conceded, and are so fully and fairly stated in his opinion as to supersede the necessity of any further statement here. The exception claimed is based entirely upon section 6 of article 1 of the constitution of the United States, the terms of which are set forth in the leading opinion. I do not think that the defendant is entitled to the exemption claimed, for two reasons: 1. Because it is not pretended that the defendant was arrested, but was simply served with a summons to answer to a civil action brought to recover the amount of an ordinary money demand; and the constitutional provision above referred to confers only the privilege of immunity from arrest and not an immunity from suit; 2. Because it is conceded that the defendant, at the time he was served with the summons, was not in attendance upon the session of the house of repre-

sentatives of which he was a member, nor was he going to or returning from the same; but, on the contrary, he was absent on leave from said house, and was at Florence, South Carolina, attending to his own private business. The question which the court is called upon to decide turns entirely upon the construction of the language used in the constitutional provision under which the exemption is claimed. The language is that senators and representatives "shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest." It seems to me that this language is so plain as to admit of but one construction. The privilege granted is freedom from "arrest," and that word has such a plain and well-defined meaning that there can be no doubt as to the meaning of such a well-known word, having such a well-defined meaning. There is not a word or syllable in the section of the constitution, which in the slightest degree indicates an intention that this word shall have any other than its universally accepted signification. No court, therefore, has any ⁶⁴ authority, from its own views of public policy, to stretch that word beyond its usual and accepted signification. It cannot for a moment be supposed that the framers of the constitution were ignorant of the wide difference between arresting the person of a debtor and simply serving him with a summons to answer to a civil action, which is, practically, nothing more than a mere notice. It would, therefore, be wholly unwarranted for a court to put such a construction upon the language found in the constitution as would make the exception conferred apply to two such very different things. It is said in that standard authority, Cooley's Constitutional Limitations, second edition, 58-60; "In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. Says Marshall, C. J.: 'The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is so often made by interested subtlety and ingenious refinement to induce the courts to force upon these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim." So in Potter's Dwarrris on Statutory Construction, at page 145, we find the same principle laid

down in the following language: "Whether courts are interpreting an agreement between parties, a statute or a constitution, the thing to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which they stand. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such case there is no room for ⁶⁵ construction. That which the words declare is the meaning of the instrument; and neither the courts nor the legislature have a right to add to, or take away from, that meaning." See, also, Endlich on Interpretation of Statutes, section 4 et seq., especially at section 5, where that writer, after saying: "What is called the policy of the government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute," introduces the following quotation from Mr. Justice Story's treatise on the Constitution: "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare ita lex scripta est, to follow and to obey; nor, if a principle so just could be overlooked, could there well be found a more unsafe guide or practice than mere policy and convenience." While, therefore, it may be supposed that good policy demands that a member of Congress, upon his attendance upon the sessions of the house to which he belongs, should not only be protected from any restraint upon his liberty by the arrest of his person, but also from being harassed by suits or actions, yet I am unable to understand by what authority a court can add to the terms of the constitution, so as to add an additional privilege to that conferred in plain terms by the constitution, whereby a member of Congress may claim a privilege not only exempting his person from arrest but also an exemption from suit. Accordingly, as is said in Cooley on Constitutional Limitations, 133, in some of the states the privilege of members of the legislature of exemption from arrest on civil process has, by constitutional provision, been extended so as to exempt members of the legislature from the service of civil process as well as from arrest of their persons, and in others of the states the estates of the members are exempted from attachment for some prescribed period. This certainly tends to show that it is con-

sidered that, without such additional provision, the privilege from arrest cannot be so construed as to include an exemption from suit. And in a note to the passage to which I have referred, that distinguished author cites ⁶⁶ two cases, *Gentry v. Griffith*, 27 Tex. 461, and *Case v. Rorabacher*, 15 Mich. 537, as holding that: "Exemption from arrest is not violated by the service of citations or declarations in civil cases."

The only case from our own state cited by Mr. Justice Pope is *Tillinghast v. Carr*, 4 McCord, 152, which, it seems to me, tends to support my view rather than his. In that case, Carr, a member of the legislature, was served with a writ while attending the legislature in Columbia, and he moved to set aside the service of the writ, under the privilege conferred by our constitution of 1790, which motion was granted. The language of that provision, which is fully set out in the opinion of Mr. Justice Pope, and need not, therefore, be repeated here, is very different from that relied on in this case. The exception there conferred is expressed in this language: "The members of both houses shall be protected *in their persons and estates*, during their attendance," etc. (*italics mine*), and that language might well be construed as extending the exemption so as to embrace immunity from suit as well as from arrest, for the protection intended applied not only to the persons of the members, but also to their estates, which, of course, would be affected by a civil suit, as well as where the person of the member was arrested; and hence, when the declared intention was to protect not only the person but also the estate of the member, the court was well warranted in construing the constitutional provision as conferring an immunity from the service of any civil process as well as from the arrest of his person in a civil action. This view seems to have been taken by Judge Colcock, who opens his opinion with these words: "In determining this question I must be governed by the words of our constitution. It will be observed that all cases of privileges are now provided for by some law, and in most of those which have been passed upon that subject, both here and in Great Britain (before the act of Anne), the word 'arrest' is used; and this construction, which has been almost always given to that word, has been, that if the body be not ⁶⁷ taken, the privilege is not violated. There can be no doubt but that the framers of our constitution were fully apprised of the various opinions upon this subject, and of all the important cases which had occurred in England, and that after a full knowledge of these

circumstances, they passed the clause of the constitution. Now if the framers of our constitution meant no more than that the member should be exempt from arrest, why did they not use the word so common on such occasions?" This language, it seems to me, plainly indicates that if Judge Colcock had been construing the constitutional provision of the constitution of the United States upon which the question under consideration turns, in which not only the word "arrest" is used, but, what is more important, no other word implying an intention to extend the exemption beyond the arrest of the person is found therein, he would have held, as he says it had almost always been held, "that if the body be not taken, the privilege is not violated." It is true, as Judge Pope frankly admits, that the case just considered is not decisive of the question, yet it does seem to me that the language which I have quoted plainly indicates that Judge Colcock would have sustained my view in this case. I find, however, another case in our state, which, by analogy, is more in point—*Huntington v. Shultz*, Harp. 452, 18 Am. Dec. 660. In that case the question was whether the defendant was exempt from the service of a writ in a civil action while attending court—the exemption being claimed under the act of 1791 (1 Brev. 226), which provided as follows: "That all persons necessarily going to, attending on or returning from the same (the superior courts), shall be freed from arrests in any civil action." Held, that the service of a writ in a civil action is not an arrest, within the meaning of the act of 1791, exempting from arrest persons necessarily attending on courts.

In preparing this opinion, which I have had to do hastily, I have not had any access to the cases cited from Wisconsin, Pennsylvania, and the Federal Reporter, and, therefore, I cannot comment upon them except to say that, judging from ⁶⁸ the quotations made from them in the opinion of Mr. Justice Pope, they seem to be based largely upon considerations of public policy and convenience, a line of reasoning, as may be seen above, which is condemned by the standard authors on constitutional law, and the rules for the construction of constitutions. At all events, those cases are not binding authority here.

2. There is also another reason why I cannot concur in the conclusion reached by Mr. Justice Pope, even if it could be conceded (as I am unwilling to do), that the word "arrest," in the constitutional provision relied upon, could be so construed as

to include an exemption from the service of a summons in a civil action, still I do not see how the exemption claimed in this case could be allowed. It will be observed that the privilege conferred is not an exemption from arrest while a member of Congress or during the sessions of that body, as we are told by the books was once the case in regard to members of the British parliament, but the exemption here is only during attendance at the session of the house of which the person claiming the exemption is a member, and in going to or returning from the same. Now in this case the conceded facts are that the defendant, when served with a copy of the summons in this case, was neither in attendance on nor was he going to or returning from the house of representatives of which he was a member, but, on the contrary, was in the city of Florence on his private business. So that in no view of the case was the defendant entitled to the exemption claimed.

I think, therefore, the order appealed from should be reversed.

Gary and Jones, JJ., concurred with McIver, C. J.

57 POPE, J. Plaintiffs commenced an action against defendant in the court of common pleas for Marion county, in this state, by the service of a summons and complaint upon him while he was at Florence C. H., in Florence county, in this state, on the sixth day of July, 1898, for the recovery of a money judgment. Thereupon the defendant, by his counsel, served the following notice: "The defendant, James Norton, by his counsel, Sellers & Sellers, without at present answering the complaint herein, alleges: 1. That he is a representative from the sixth district of the state of South Carolina in the Congress of the United States of America; that as such he is not amenable to process, either criminal or civil, except in specified cases, during the season of the said Congress or in going to or returning from the same; 2. That on the sixth day of July, 1898 (the day on which copy of summons and complaint was served upon him, in the town of Florence, South Carolina), the said Congress was in session in the city of Washington, D. C., he being absent therefrom on leave. Wherefore, you will take notice that 58 defendant, by his counsel, will move the court of common pleas, at 12 o'clock M., on the first day of the next term thereof for said county, or as soon thereafter as counsel can be heard, to set aside the service of said summons and complaint as being unconstitutional, illegal, and void; and, failing

in that motion, he hereby reserves the right, by leave of the court, to answer said complaint nunc pro tunc." It was admitted at the hearing that on the sixth day of July, 1898, the time of service of summons and complaint, James Norton, defendant, was a representative in Congress from this state, and at the time of service he was in Florence, South Carolina, on private business, being absent on leave from Congress, then in session, and that Congress adjourned sine die on the eighth day of July, 1898.

The motion being heard, his honor, the presiding judge, passed the following order: "The motion made in above case to set aside the service of the summons and complaint, on the grounds set forth in the notice served upon plaintiff's counsel, July 25, 1898, having been heard, and after argument of counsel, it is ordered that the service of said summons and complaint be set aside as illegal and void, it being admitted that Congress was in session, and that James Norton was a member thereof, and absent therefrom on leave."

The plaintiffs, through their counsel, gave due notice of appeal and subsequently filed their exceptions, as follows: "It is submitted that his honor, the circuit judge, erred: 1. In dismissing the service of the summons and complaint, and in holding the same to be illegal and void, on the ground that 'Congress was in session, and that James Norton was a member thereof, and absent therefrom on leave'; 2. In not holding that the service of the summons and complaint was legal and valid, because the same was not an arrest, and the defendant was neither in attendance upon Congress nor going to or returning from the same; 3. In not holding that representatives in Congress are privileged solely from arrest, except in treason, felony, and breach of the peace, during their attendance upon Congress while in session, and ⁵⁹ in going to and returning from the same, and in not holding that a representative in Congress is at all times amenable to the service of a civil process of the character served upon the defendant."

The language of the federal constitution is as follows (U. S. Const., art. 1, sec. 6): "The senators and representatives shall receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in any house

they shall not be questioned at any other place." Of course, the question we are called upon to settle depends upon the meaning to be given to the words "privileged from arrest." If we adhere to the literal meaning of the word "arrest," the circuit judge was in error. But is such a restricted meaning proper? In the judgment of the writer of this opinion, the words "privileged from arrest," as used in the federal constitution, are words of art, meaning freedom from service of any civil process. These are the words of the common law and of the mother country. It is to be regretted that the supreme court of the United States has not spoken in regard to the true meaning to be accorded the words "privileged from arrest." In our own state, in the case of *Tillinghast v. Carr*, 4 McCord, 152, when the privilege of a member of the house of representatives of the state of South Carolina was invaded by a summons in a civil proceeding, the court held that the language of the fourteenth section of article 1 of the state constitution, which was in these words: "The members of both houses shall be protected in their persons and estates during their attendance on, going to, and returning from the legislature, and ten days previous to the sitting and ten days after the adjournment of the legislature; but these privileges shall not be extended so as to protect any member who shall be charged with treason, felony, or breach of the peace," ⁶⁰ were broad enough to cover the cases, not only of arrest but summons in a civil proceeding. The court in its reasoning uses this language: "It must be obvious that a member may be much harassed by suits, although his body is not arrested. His mind must, of course, be greatly disturbed and drawn off from his business; besides, it brings upon him a sort of odium which lessens his usefulness. If it be admitted that he may be served with a summons while attending on the legislature, it follows that he may be served with a summons *eundo et redeundo*, and thus he might, by ill-natured and malicious creditors, be sued in every district through which he passed, going and returning, and might be required to attend a court, which might be sitting while the legislature was convened, and thus, perhaps, an undue advantage taken of him, etc." It must be admitted that the judge who prepared this opinion (Judge Colcock) did not understand the word "arrest" to be synonymous with the words just quoted from the state constitution. This was not necessary to the decision of the court. There are at least two decisions of courts in other states which have construed the

meaning of the word "arrest" in the federal constitution, as used in the section of that instrument already quoted herein, to be freedom from a summons in a civil action as well as actual arrest in such an action. The case of Doty v. Strong, 1 Pinn. 84, was when a delegate in Congress from the territory of Wisconsin had been served with summons in a civil action. He pleaded his privilege as a member of Congress in freedom from arrest and summons in a civil action. The supreme court held that as a member of Congress, under the federal constitution, he was free not only from actual arrest but also from any summons in a civil action. Here is the language used by Mr. Justice Miller, in delivering the opinion of the court: "The defendant relied upon the sixth section of the first article of the constitution of the United States, which, in speaking of the senators and representatives in Congress, contains the following language: 'They shall in all cases, ⁶¹ except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same.' The reason of this provision is obvious. The people elect their representatives to Congress to protect their rights and advance their interests, which should not be jeopardized by the arrest of their representative for debt or private contract of his own, and it is equally necessary that his rights and interests should be protected while absent in the public service. In order to render this provision available to the extent of its necessity, it will not do to construe the words 'privilege from arrest' in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary to the protection of the rights of the people that their representative should be relieved from absenting himself from his public duty during the session of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of the constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit. We have only been able to find one authority on this subject, after a careful search. It is a decision of the supreme court of Pennsylvania, in the case of Geyer v. Irwin, 4 Dall. 96. That decision was made upon the same provisions in the constitution of that state,

and couched in the same language as that under consideration. The court in that case declared that 'a member of the general assembly is undoubtedly privileged from arrest, summons, certiorari, or other civil process during his attendance on the public business confided to him, and that upon principle, his suits cannot be forced to a trial and decision while the session of the legislature continues.' " There has been a more recent case, that of *Miner v. Markham*, 28 Fed. Rep. 62 387 where Judge Dyer of the United States circuit court, in construing this same provision of the federal constitution, held, that "a member of Congress is entitled to exemption from service of process, although not accompanied with an arrest of the person, while on his way to attend a session of Congress." Although this is only a circuit opinion, Judge Dyer has done his work in defending the construction of this provision of the constitution so ably that we are strongly tempted to quote at length from such an admirable opinion; but we have already quoted quite enough to set forth the principle upon which we rely in sustaining the circuit judgment of Judge Watts in the case at bar. The decision of this question renders unnecessary any prolonged notice of that ground of appeal which claims that the circuit judge overlooked the fact that service of process was made upon Norton in his absence from his seat in Congress, and on two days before the Congress adjourned. Mr. Norton, although absent on leave from his seat in Congress, was liable to be summoned to return to Congress at any moment. Besides, Congress was in session when he was served with process. Public policy, as well as the federal constitution, demand that these gentlemen, who are elected by the people as their representatives in the lower house of Congress, shall not be harassed by civil suits while Congress is in session, and also for a reasonable time in going to and returning from Washington. In my opinion, our judgment should be: "It is the judgment of this court, that the order of the circuit court, which was appealed from, be affirmed." But the majority of the court think otherwise.

Hence it is my duty to state that the judgment of the circuit court be reversed, and the cause remanded to the circuit court, with leave to the defendant to answer in twenty days after the remittitur reaches the court below; but that in the event the defendant fails to answer in said twenty days, that the plaintiff have leave to apply to the court for judgment, but I dissent from this judgment.

Exemption from Service of Civil Process.

Persons in Office.—Under the rules of international law, ambassadors and public ministers are exempt from the jurisdiction of the courts of the country to which they are sent. Hence they are exempt from the service of process of such courts: 1 Kent's Commentaries, 38. Under the guaranty contained in the federal constitution that members of Congress shall in all cases be "privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same," a member of the house of representatives or of Congress is entitled to exemption from the service of civil process, although not accompanied with arrest of the person, while on his way to attend a session of Congress. And this privilege, although not strictly confined to the exact number of days required for the journey, must be limited to a reasonable time: *Minor v. Markham*, 28 Fed. Rep. 387. And in *Doty v. Strong*, 1 Pinn. 84, it was held that this privilege extends as well to delegates from the territories as to senators and representatives from the states. But in *Bartlett v. Blair*, 68 N. H. 232, the supreme court refused to quash a service of summons made upon a member of Congress while it was in session and while he was in attendance thereon. The court said: "This question being a federal one, it is not necessary and would be useless for us to form or express an opinion upon it, and, in the absence of any adjudication by the supreme court of the United States extending the privilege to the service of summons or like civil process, the motion to quash is denied."

The constitutions of the several states of the United States contain a provision exempting the members of the state legislature from arrest during the session of such legislature and while going to and returning therefrom. Whether such constitutional provision exempts legislators from the service of civil process is a much mooted and disputed question, and although, perhaps, a majority of the cases hold that such privilege from arrest also exempts from the service of civil process, the rule is by no means settled to this effect. In *Anderson v. Rountree*, 1 Pinn. 115, it was held that the privilege from arrest secured to members of the legislature, not only exempts their persons from arrest, but also exempts them from suit or civil process, which may interfere with their public duties during the continuance of their privilege. And in *Geyer v. Irwin*, 4 Dall. 107, it was decided that a member of the general assembly was undoubtedly privileged from arrest, summons, citation, or other civil process, during attendance on his public business, and that his suits could not be forced to trial during the session of the legislature. To the same effect: *Tillinghast v. Carr*, 4 McCord, 152; *King v. Coit*, 4 Day, 129.

On the other hand, it has been decided that members of the legislature are not, by virtue of constitutional exemption from arrest, exempt from the service of civil process, either during the sessions

of the legislature of which they are members, or while going to or returning therefrom: *Gentry v. Hyatt*, 27 Tex. 461; *Rhodes v. Walsh*, 55 Minn. 542; *Johnson v. Offutt*, 4 Met. (Ky.) 19; *Catlett v. Morton*, 4 Litt. 122.

A justice of the supreme court of a state privileged from arrest cannot be served with summons in a civil suit while engaged in the discharge of his official duties, or while traveling to or from his court. At all other times, however, such justice may be served with civil process: *Lyell v. Goodwin*, 4 McLean, 29. There can be no valid service of summons upon a justice of the peace while he is holding court: *Cameron v. Roberts*, 87 Wis. 291, 41 Am. St. Rep. 43.

Persons engaged in the military service, whether in the state militia or in the regular army, are exempt from the service of civil process when in actual service or when going to or returning from any muster or state encampment: *Williams v. McGrade*, 13 Minn. 174; *Davidson v. Barclay*, 63 Pa. St. 406; *Land Title etc. Co. v. Rambo*, 174 Pa. St. 566; *Gregg v. Summers*, 1 McCord, 461; *Greening v. Sheffield, Minor*, 276; *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

It is a common-law rule and a principle founded on public policy that an attorney at law is privileged from the service of civil process, such as a summons, while attending upon a court, either as an attorney or a witness, or while going thereto from the place of his residence, or returning therefrom to the same place: *Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 67 Am. St. Rep. 458; *Central Trust Co. v. Milwaukee Street Ry. Co.*, 74 Fed. Rep. 442; *Gilbert v. Vanderpool*, 15 Johns. 242; *Secor v. Bell*, 18 Johns. 52. The Illinois statute exempts attorneys from arrest while attending court, but it has been held that such statute does not exempt an attorney, whether resident or nonresident, from the service of summons in a civil suit while he is in attendance upon a court: *Robbins v. Lincoln*, 27 Fed. Rep. 342. No reference was made in this case to the common-law rule or to any case either upholding or denying it.

Parties and Witnesses who are residents of the county or state in which the court is held, and who are in good faith in attendance thereon, are privileged from the service of summons or any other civil process in another suit during the time of their attendance, and for a reasonable time in going and returning to their homes: *Cameron v. Roberts*, 87 Wis. 291, 41 Am. St. Rep. 43; *Larned v. Griffin*, 12 Fed. Rep. 590; *Thornton v. American Writing Machine Co.*, 83 Ga. 288, 20 Am. St. Rep. 320; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Halsey v. Stewart*, 4 N. J. L. (*366) 420; *Gregg v. Sumner*, 21 Ill. App. 110; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Brett v. Brown*, 13 Abb. Pr., N. S., 295; *Christian v. Williams*, 35 Mo. App. 297; *Holyoke etc. Ice Co. v. Ambden*, 55 Fed. Rep. 593. Service of process upon a suitor or witness when he is in attendance in court is not void, though voidable, and if he does not claim his privilege in any manner, and allows judgment to be rendered

against him, such judgment must be considered valid, and cannot be vacated on his motion a long time afterward: *Thornton v. American Writing Machine Co.*, 83 Ga. 288, 20 Am. St. Rep. 320; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754.

Nonresidents—Parties.—A nonresident suitor, coming into the state for the sole purpose of attending the trial of his case or business connected therewith, such attendance being shown to be necessary, is privileged from the service of civil process while coming to, returning from, and attending upon, the court for the purpose of such trial, and "a perusal of the cases in which the immunity of a suitor in attendance upon court has been declared discloses the fact that no distinction has generally been made between a plaintiff and defendant. The reasoning of the courts is as applicable to one as to the other, and the rule of privilege has been applied indiscriminately". *Fisk v. Westover*, 4 S. Dak. 236, 46 Am. St. Rep. 780; citing *Ex parte Hurst*, 1 Wash. C. C. 186; *In re Healy*, 53 Vt. 694, 38 Am. Rep. 713; *Matthews v. Tufts*, 87 N. Y. 568; *Henegar v. Spangler*, 29 Ga. 217; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Small v. Montgomery*, 23 Fed. Rep. 707; *Mitchell v. Circuit Judge*, 53 Mich. 541; *Parker v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 770. To which may be added *Jacobson v. Hosmer*, 76 Mich. 234; *Ballinger v. Elliott*, 72 N. C. 596; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754. Such suitor is also entitled to such exemption for a reasonable time after the termination of the trial to enable him to return to the place of his residence: *Linton v. Cooper*, 54 Neb. 438, 69 Am. St. Rep. 727; *Fisk v. Westover*, 4 S. Dak. 233, 46 Am. St. Rep. 780; *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731; *Hicks v. Besuchet*, 7 N. Dak. 429, 66 Am. St. Rep. 665. "One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the supreme court of Ohio in the case of *Andrews v. Lembeck*, 46 Ohio St. 40, 15 Am. St. Rep. 547, thus: 'The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered'": *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 507, 54 Am. St. Rep. 276. In *Hale v. Wharton*, 73 Fed. Rep. 740, Mr. Justice Phillips, in passing upon this question, while delivering the opinion of the court, said: "It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of the United States courts than that of the exemption of persons from the writ of summons while attending upon courts of justice, either as witnesses or suit-

ors": Citing many federal cases. "As said by Judge Shiras in *Nichols v. Horton*, 14 Fed. Rep. 330: 'Experience has shown that in order that causes may be fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses, and jurors shall be protected from the service of process in civil actions while they are in good faith in attendance upon the trial of causes. If parties or witnesses are liable to be sued when in attendance upon the court in which the cause with which they are connected is pending, and by reason thereof they may be compelled to appear and answer in a foreign tribunal, or in one different and far distant from that wherein alone they could have been sued had they not been in attendance upon the court, the fear thereof might well deter them from attending at the place of trial, and, if they were beyond the reach of a subpoena, a party might, as a consequence, be deprived of the personal presence and testimony of witnesses whose absence would be fatal to his cause.' A like rule obtains in a great majority of the states of the Union. This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power": *Hale v. Wharton*, 73 Fed. Rep. 741.

The privilege of a suitor or witness to be exempt from the service of civil process while without the jurisdiction of his residence, for the purpose of attending court in another jurisdiction, extends to every proceeding of a judicial nature, taken in or emanating from a duly constituted judicial tribunal, which directly relates to the trial of the issues involved: *Parker v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 770. The rules above announced are of such universal application and so well supported that it is unnecessary to multiply the citation of authority, while the cases opposed to such doctrine are so isolated and generally condemned by the majority that it is useless to give them more than a cursory examination. The following cases, however, hold that a nonresident suitor attending court in the matter of his suit is not exempt from the service of a writ of summons against him in another suit: *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741; *Capwell v. Sipe*, 17 R. I. 475, 33 Am. St. Rep. 890; *Ellis v. Degarmo*, 17 R. I. 715; *Bishop v. Vose*, 27 Conn. 1; *Mullen v. Sanborn*, 79 Md. 364, 47 Am. St. Rep. 421; *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726. The decision in *Bishop v. Vose*, 27 Conn. 1, was virtually overruled by that in *Wilson Sewing Machine Co. v. Wilson*, 51 Conn. 595, 22 Fed. Rep. 803, wherein it was held that a nonresident defendant who comes into the state and is in necessary attendance upon the trial of his case, is privileged, while so in attendance, from the service of process upon him in another civil action.

Returning to the best considered and supported rule, it only remains to give some examples of the application thereof. Thus, a person who comes into the state for the purpose of testifying as a witness in an action to which he is a party cannot be legally served with summons at the suit of the party plaintiff in the action which he came to defend: *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48. And a nonresident party to an action is privileged from liability for suits commenced by summons while necessarily and in good faith attending the trial thereof, or an examination therein before a referee or master in chancery: *First Nat. Bank v. Ames*, 39 Minn. 179. A nonresident who has come into the district to attend the trial of a case in which he is a suitor, and is detained within the jurisdiction as a witness in another suit, is not subject to civil process for the institution of suits against him while so detained: *Small v. Montgomery*, 23 Fed. Rep. 707. A suitor who has come into the jurisdiction upon the request of his counsel, and for the purpose of consultation during the argument of a demurrer in his case, is privileged from the service of civil process, in any part of such jurisdiction, during such argument, and pending a temporary adjournment of the court: *Kinne v. Lant*, 68 Fed. Rep. 436. A nonresident suitor who comes within the jurisdiction of the courts of a state for the sole purpose of attending the taking of depositions to be used by his adversaries in a suit pending in another state, to which such nonresident is a party, cannot be served with process in a civil suit instituted in the courts of the former state: *Partridge v. Powell*, 180 Pa. St. 22. A nonresident of the state against whom an action is pending in a national court in the state of his residence, and who comes into another state to attend the examination, before a notary public, of the plaintiff and the latter's witnesses, is exempt from the service of process, and if, while such defendant is there, the plaintiff dismisses the action in the other state, and thereupon commences another for the same cause in the courts of this state and within its territory, and serves process on the defendant while he is on his way home, such service is unauthorized, and should be vacated on motion: *Parker v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 770; *Juneau Bank of McSpedan*, 5 Biss. 64; *Dungan v. Miller*, 37 N. J. L. 182; *Greer v. Youngs*, 17 Ill. App. 106. A person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is privileged from the service of summons while going to, returning from, and remaining at the place of such hearing: *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547.

Nonresident Witnesses, like nonresident parties who come within the jurisdiction of the court, in good faith, for the purpose of attending the trial of a case therein as witnesses, are privileged from the service of civil process, not only while coming to, returning from, and attending upon the court for the purposes of the trial,

but also for a reasonable time after the hearing to prepare for departure, and what is such reasonable time must depend upon, and be determined by, the peculiar circumstances of each particular case: *Linton v. Cooper*, 54 Neb. 438, 69 Am. St. Rep. 727; *Hicks v. Besuchet*, 7 N. Dak. 429, 66 Am. St. Rep. 665; *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731; *Parker v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 770; *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 25 Am. St. Rep. 582; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Sherman v. Gundlach*, 37 Minn. 118; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Brooks v. Farwell*, 2 McCrary, 220; *Atchison v. Morris*, 11 Biss. 191; *Ela v. Ela*, 68 N. H. 312. "This rule is founded upon principles of public policy and the due administration of justice, which is subserved by the presence of witnesses to give their evidence orally before the court. The privilege protects the witness in going, in staying, and in returning to his home, provided he acts in good faith and without unreasonable delay. This immunity from such service, depending, as it does, upon grounds of public policy, does not require statutory authority to enable courts to enforce the rule and set aside a summons thus improperly served. The object of affording such immunity is to encourage witnesses from other states to come forward voluntarily and testify, and the rule exempting such witnesses from the service of process while attending as such witnesses in another state commends itself to the courts as a wise and proper one. This immunity works no injustice to anyone, for, unless the witness comes within the state, there would be no opportunity to serve process upon him. Therefore, the plaintiff who attempts to get service upon the witness while he is here as such, neither loses any rights, nor suffers any injury by reason of the rule. He is simply prevented from taking advantage of the necessary presence of the witness in furtherance of his own private purposes": *Malloy v. Brewer*, 7 S. Dak. 587-591, 58 Am. St. Rep. 856. As an example of such exemption it may be stated that the vice-president of a foreign corporation, who comes into the state to testify before a supreme court commissioner, which testimony is to be used on a motion to set aside a service of summons, issued in an action against such corporation, made within the state upon a supposed agent of such corporation, is exempt from the service of summons in another action against such corporation while in attendance as such witness: *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153. Even in such states as hold that a non-resident suitor is not entitled to this exemption it is held that non-resident witnesses are exempt from the service of civil process in another suit: *Capwell v. Sipe*, 17 R. I. 475, 33 Am. St. Rep. 890. The rule applies, although the witness attends voluntarily and without a subpoena: *Dungan v. Miller*, 37 N. J. L. 182; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48. And the privilege of the witness is not affected by the fact that he is also a party to the suit, and has

been served with summons in that capacity: *Christian v. Williams*, 85 Mo. App. 297. In many cases it is held that this privilege is not confined to witnesses who are nonresidents of the state, but extends also to nonresidents of the county or of the jurisdiction of a particular court: *Gregg v. Sumner*, 21 Ill. App. 110; *Larned v. Griffin*, 12 Fed. Rep. 590; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Jacobson v. Hosmer*, 76 Mich. 234.

Parties Decoyed.—A person who is induced to come within the jurisdiction of the court or within the state by deception or trick practiced upon him by plaintiff for the purpose of serving a summons is exempt from the service thereof, and service so made is irregular, and may be set aside on motion: *Williams v. Reed*, 29 N. J. L. 385; *Nason v. Esten*, 2 R. I. 337; *Metcalf v. Clark*, 41 Barb. 45; *Baker v. Wales*, 14 Abb. Pr., N. S. 331; *Wood v. Wood*, 78 Ky. 624; *Wyckoff v. Packard*, 20 Abb. N. C. 420. If a person has been brought from another state by force, or has been induced to come into the state by the fraud and deceit of another for the purpose of procuring the service of summons in a civil action, and service has thus been made, it may be quashed by proper plea and proof: *Blair v. Turtle*, 1 McCrary, 372. To serve process upon one who has thus been decoyed into the jurisdiction by false representations is an abuse of judicial process: *Chubbuck v. Cleveland*, 37 Minn. 466, 5 Am. St. Rep. 864; *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523; *Byler v. Jones*, 22 Mo. App. 623. And this is true although the design of the representations was to obtain an arrest under criminal process, and the institution of the civil suit was a mere afterthought: *Townsend v. Smith*, 47 Wis. 623, 32 Am. Rep. 793. If the evidence is sufficient to show that deceit has been used for the purpose of bringing a person within the jurisdiction of the court, that he may be served with summons, and thus subjected to an action, the service so obtained may be set aside as irregular: *Baker v. Wales*, 45 How. Pr. 137; *Duringer v. Moschino*, 93 Ind. 495. A few cases hold, however, that if the service of process is regular on its face, it is not void merely because the defendant was induced to come within the jurisdiction where it was served by a letter inviting him there for another purpose, or where no injury is caused thereby: *Fearl v. Hanna*, 129 Pa. St. 588; *Bank of Ogden v. Davidson*, 18 Or. 57; *Duringer v. Moschino*, 93 Ind. 495.

Parties Under Criminal Process.—The mere fact that a person is in jail or prison under a criminal charge or sentence furnishes no exemption against the service of civil process upon him. An imprisoned person is subject to be sued and prosecuted to judgment, and proceeded against in all the modes prescribed by law to enforce civil remedies, the same as if he were at large: *Morris v. Walsh*, 14 Abb. Pr. 387; *Davis v. Cummins*, 3 Yeates, 387; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *Dunn's Appeal*, 35 Conn. 82. A person in custody on a criminal charge may, before or after

conviction, be served with civil process: *Slade v. Joseph*, 5 Daly, 187. Thus, the service of civil process upon a convict in the state's prison is valid and gives the court jurisdiction: *Davis v. Duffie*, 1 Abb. App. Dec. 486; *Smith v. McGlasson*, 7 J. J. Marsh. 154; *Phelps v. Phelps*, 7 Paige, 150; *Lucas v. Albee*, 1 Denio, 666; *Bonnell v. Rome* etc. R. R. Co., 12 Hun, 218. In *Grant v. Dalliber*, 11 Conn. 234, it was held that a person, although serving a term in the state's prison, retained his place of residence at his former home, and that his real estate there might be lawfully attached by leaving copies of the writ at his dwelling-house, as in such case his usual place of abode was not abandoned or changed by reason of his constrained removal therefrom.

Nonresidents.—As to nonresidents charged with crime, or brought within the jurisdiction of the court by compulsory process, the general rule seems to be that they are exempt from the service of civil process while coming into the jurisdiction, while necessarily in attendance upon the court, and while returning to their place of residence, provided no unnecessary delay occurs in returning: *United States v. Bridgman*, 9 Biss. 221; *Benninghoff v. Oswell*, 37 How. Pr. 235; *King v. Phillips*, 70 Ga. 409. The criminal process of the state cannot be used to take a person from one county to another so as to subject him to the service of civil process in the latter county: *Byler v. Jones*, 79 Mo. 261. And one charged with a criminal offense in another county than that of his residence, and who on the trial is discharged, is privileged from civil suit in that county until the lapse of a reasonable time to enable him to return home: *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844. A person charged with crime, who has been arrested in another than his home county, has a right to consult counsel, and, on being released on bail, pending his examination, it is not unreasonable for him, on his way home, to go through another county, where his regular counsel lives, for that purpose, and a delay of a day after his arrival, waiting to obtain such advice, is not unreasonable, and the service upon him of civil process in a suit involving the same facts as the criminal charge, while thus consulting his counsel, is a breach of privilege and an abuse of process: *Jacobson v. Hosmer*, 76 Mich. 234. In *Moleter v. Sinnen*, 76 Wis. 308, 20 Am. St. Rep. 71, and *Compton v. Wilder*, 40 Ohio St. 130, it was held that a person who has been brought into the state upon requisition as a fugitive from justice, and has given bail, been tried for, or discharged as to the crime charged against him, is not subject to the service of civil process by anyone until a reasonable time and opportunity has been given him to return to the state from which he was taken. These cases undoubtedly present the true and correct rule, although inferior courts have decided that civil process may be served upon a person extradited or brought into the state on criminal process, if the creditor bringing the suit has nothing to do, directly or indirectly, with bringing such debtor within the juris-

diction of the court: *Nichols v. Goodheart*, 5 Ill. App. 574; *Slade v. Joseph*, 5 Daly, 187.

Remedy.—Service of process upon a privileged person is not void, but a mere irregularity and voidable, which may be waived by trial or confession of judgment, and it is generally held that the privilege must be claimed by plea in abatement, or motion to vacate such service, made in the particular case, and at the proper time: *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622; *Thornton v. American Writing Machine Co.*, 83 Ga. 288, 20 Am. St. Rep. 320; *Prentis v. Commonwealth*, 5 Rand. 697, 16 Am. Dec. 782; *Lyell v. Goodwin*, 4 McLean, 29. This privilege of a person from the service of civil process cannot be noticed by the courts *ex officio*. As it may be waived it must be claimed, and it can only be claimed by plea, or on motion made at the proper period. If such privileged person allows judgment to be rendered against him during the existence of his privilege, and does not seek, during the progress of the proceedings, either to abate or suspend them, he thereby waives his privilege, and the judgment, if one is rendered against him, is valid, and cannot be vacated on his motion: *Thornton v. American Writing Machine Co.*, 83 Ga. 288, 20 Am. St. Rep. 320; *Prentis v. Commonwealth*, 5 Rand. 697, 16 Am. Dec. 782. The proper way for a person to avail himself of exemption from the service of process is by motion to set aside such service, and, if he answers, though in his answer he claims such exemption, it will be a waiver of it: *Williams v. McGrade*, 13 Minn. 174. Such motion to set aside the service of process on the ground of privilege must be made promptly: *Pollard v. Union Pac. R. R. Co.*, 7 Abb. Pr., N. S., 70. The remedy is not by motion to dismiss the action, but by motion on special appearance to set aside the return of the service, and if such motion is denied the ruling may be reviewed on appeal: *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731; *Parker v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 770. Service upon a privileged resident is not void, but merely voidable, and the court may set it aside, or change the venue, or grant any other appropriate relief: *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754. A person entitled to exemption from the service of civil process may avail himself of such privilege by plea in abatement: *King v. Coit*, 4 Day, 129; *Gregg v. Sumner*, 21 Ill. App. 110. If the privilege from the service of civil process has been abused, the facts may be set forth by an answer in the nature of a plea to the jurisdiction, constituting a good defense: *Byler v. Jones*, 79 Mo. 261. Where this breach of privilege has occurred mandamus will lie to compel the setting aside of such service: *Jacobson v. Hosmer*, 76 Mich. 234. The line of demarcation between the remedy by motion and by plea seems to be, that when a privileged person has been served with process defective on its face, or if the return of such process is of itself insufficient, the defeat may be taken advantage of by motion to quash or dismiss, but if the objection to the writ or ser-

vice does not appear upon the face of the proceedings and has to be shown by matters dehors the record, the objection must be made by plea in abatement: *Greer v. Young*, 120 Ill. 184. If a privileged person is served with process from a state court, the filing in that court of a petition and bond for removal to the federal court is not such an appearance as will prevent him from objecting to the service when the case is removed to the federal court: *Atchison v. Morris*, 11 Biss. 191.

ROBERTSON v. BLAIR.

[56 SOUTH CAROLINA, 96.]

EVIDENCE—COMPROMISE.—Statements made in the course of negotiations looking to a compromise cannot be admitted in evidence against the party making them, if the effort to compromise proves abortive.

JUDGMENTS AGAINST INFANTS—JURISDICTION.—If a judgment has been rendered against an infant in an action in which the court has acquired jurisdiction of the person of the infant by service of summons upon him personally, such judgment is merely voidable, and not void, even though no guardian ad litem was appointed for such infant.

JUDGMENTS AGAINST INFANTS—VOIDABLE REMEDY. The proper remedy to set aside a voidable judgment against a minor for failure to have him represented by guardian ad litem is by motion in the case.

JUDGMENTS AGAINST INFANTS—AVOIDANCE.—Infants have, in general, no absolute right to avoid a judgment or decree against them, and even an irregular judgment cannot be vacated as of course.

JUDGMENTS AGAINST INFANTS — AVOIDANCE — LACHES.—Although a judgment obtained against an infant, who did not appear by guardian, is irregular, yet the court is not bound, after the infant has attained his majority, to set aside such judgment upon the mere fact that he was an infant when it was obtained, but may consider lapse of time, the conduct of the infant, the ignorance of the plaintiff that he was a minor, and other circumstances as having confirmed the judgment, or rendered the interference of the court improper.

NOTICE—PUBLIC OFFICE.—An act done in public office, open for the information of parties interested, must be taken notice of by them.

APPEALS.—THE PROVINCE OF THE APPELLATE COURT is to inquire only whether there is error in the judgment or decree appealed from, and not whether the reasons given for the conclusion reached are tenable.

J. W. Hanahan, for the appellant.

J. E. McDonald, for the appellee.

¹⁰² McIVER, C. J. These three cases, growing out of the same facts, and depending upon the same principles, were heard and will be considered together. A motion was made before his honor, Judge Gage, at September term, 1898, of the court of common pleas for Fairfield county, to vacate the judgments entered in each of said cases upon the ground that the defendant, L. M. Blair, was a minor at the time said judgments were entered, and that no guardian ad litem was appointed to represent him in the actions in which said judgments were obtained. The facts as set forth in the moving papers and in the "case" are undisputed, and may be stated as follows: The actions were commenced by the plaintiffs respectively by summons and complaint issued on the 20th of August, 1891, and served on the defendants, personally, on the 27th of August, 1891, ¹⁰³ as appears by the indorsements on each summons. These actions were based upon money demands alleged to be due the plaintiffs respectively for goods sold and delivered by them to the defendants, L. M. Blair & Bro., a co-partnership composed of the said L. M. Blair and his brother, J. E. Blair. No notice of an application for the appointment of a guardian ad litem for the defendant, L. M. Blair, was served, and no petition for the appointment of a guardian ad litem for said L. M. Blair was ever filed, and no order for the appointment of such guardian ad litem was ever made. No answers having been filed by either of the defendants, orders for judgments by default were indorsed on the complaint in each of said actions, on the 3d of October, 1891, and such judgments were entered on the 9th of October, 1891. The defendant, L. M. Blair, was born on the 14th of January, 1871, and was, therefore, a minor at the time of the recovery of said judgments, though this fact was not then known to the plaintiffs, and only known now from the statements made in the affidavits in support of the motion to vacate the judgments. The fact that the other defendant, J. E. Blair, was sui juris when the judgments were recovered, is not disputed, and, in fact, is admitted by his affidavit. L. M. Blair says, in his first affidavit, in support of his motion to vacate the judgments, "that he has a good defense to the alleged cause of action in said suit, which has not been made in his behalf by reason of his not being represented by guardian ad litem in said suit"; but he does not state what is such defense, nor the facts upon which it is founded, nor does he state that he has fully and fairly stated the same to his counsel, and has been advised by him

that he has a good defense. In his second affidavit, this defendant, L. M. Blair, says: "That the first information he had of the existence of the said judgment was in the month of April, 1898 (which from other statements made in the moving papers appears to have been on or about the 7th of April, 1898), when he received a letter from the branch office of Bradstreet Mercantile Agency in Charleston, South Carolina, demanding payment of said judgment; ¹⁰⁴ that thereupon deponent went to Winnsboro and examined the records, and found the said judgment on record in the office of the clerk of court; that up to the time he received the letter above mentioned he did not know of said judgment, and was surprised to learn of the same; that he thereupon immediately consulted with his attorney as to the proper steps to be released from said judgment, and to have the same set aside and declared null and void." But the record before us shows that no step in this direction was taken until 11th of August following, though it is due to the appellant to say that this delay may have been due to the negotiations into which he entered with the attorney for plaintiffs looking to a compromise of these judgments which proved to be abortive. What passed between these parties in the course of these negotiations is fully set out in the "case," but need not be stated here, as it is contrary to the policy of the law to allow statements made in the course of negotiations looking to a compromise to be offered in evidence against the party making them, if the effort to compromise proves abortive: 1 Greenleaf on Evidence, sec. 192.

Upon the facts thus substantially stated, the circuit judge passed an order refusing the motions to vacate the judgments, from which this appeal has been taken upon the several grounds set out in the record, and the respondents, according to the proper practice, have given notice that they will ask this court to sustain the order of Judge Gage upon the additional grounds set out in the record. A copy of the order, together with the grounds of appeal, as well as the additional grounds upon which the court is asked to sustain the order appealed from, should be embraced in the report of this case by the reporter.

We do not propose to consider these various grounds serialim, but will rather confine our remarks to what we regard as the controlling questions in the case.

In the first place, we may remark that there is nothing on the record of these judgments to show any jurisdictional defect. On the contrary, these records show ¹⁰⁵ that the court

not only had jurisdiction of the subject matter (as to which there is no controversy), but also of the persons of these defendants; for the code, section 148, provides that: "Civil actions in the courts of record of this state shall be commenced by service of a summons"; and in section 160 it is declared that: "From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." Now as the conceded fact is that it appears on the record that both of these defendants were personally served with the summons and complaint on the 27th of August, 1891—more than twenty days before the judgments were rendered—it is very clear that the court not only had jurisdiction of the subject matter, but had also acquired jurisdiction of the persons of both defendants; for although it now appears that one of these defendants—L. M. Blair—was a minor at the time, yet as it also appears that he was over the age of fourteen years, and was properly made a party by personal service of the summons, as provided by subdivision 4 of section 155 of the code, there can be no doubt that the court thereby acquired jurisdiction of his person. It follows, therefore, that when a judgment has been rendered against an infant in an action in which the court has acquired jurisdiction of the person of the infant by the service of the summons upon him personally, such judgment is not void even though no guardian ad litem shall have been appointed for the infant, but is merely voidable. This view is supported by authority both here and elsewhere. In 10 Encyclopedia of Pleading and Practice, 630, it is said, in speaking of such a judgment: "The judgment is merely erroneous; it is voidable but not void, and, until set aside in a proper proceeding for that purpose, it is valid and binding." To the same effect see the same volume of that valuable work, page 632, where it is said: "The omission to appoint a guardian ad litem does not affect the jurisdiction of the court." And again at page 634, where it is said: "If the court has jurisdiction ¹⁰⁶ of the parties and the subject matter, irregularities in the appointment, or even the fact that no appointment of a guardian ad litem was made, do not, as has been seen, render the judgment void, and being merely errors or irregularities, they may be cured or waived." And at page 726 of the same volume, it is said that this is true even when the judgment is by default. So, also, in *Finley v. Robertson*, 17 S. C. 435, it was held that the mode prescribed by stat-

ute—the code—for making infants parties to an action, to wit, by personal service of the summons, where, as in this case, the infant is over the age of fourteen years, must be strictly followed, or otherwise the court will not obtain jurisdiction of the person of the infant. Now while the writer of that opinion does go on to say that “equal care must be observed in the appointment of a guardian ad litem, the prerequisites to which appointment are likewise clearly enacted,” yet that case does not hold, as seems to be supposed, that the appointment of a guardian ad litem is necessary to enable the court to acquire jurisdiction of the person of the infant. It only holds that the appointment of a guardian ad litem in the mode prescribed by the code is necessary to relieve the judgment from any imputation of error in rendering the same. If there could be any doubt of this, such doubt is dispelled by the subsequent case of *Genobles v. West*, 23 S. C. 166, 167, where it was held that after the court had acquired jurisdiction of the person of an infant, by the personal service of the summons, any errors or irregularities subsequently occurring cannot affect the question of jurisdiction: See, also, *Riker v. Vaughan*, 23 S. C. 187, and *Tederall v. Bouknight*, 25 S. C. 275. The cases of *Bulow v. Witte*, 3 S. C. 309, *Walker v. Veno*, 6 S. C. 459, *McCroskey v. Parks*, 13 S. C. 92, and *Rollins v. Brown*, 37 S. C. 345, together with other older cases, have been or may be cited to show that the appointment of a guardian ad litem was necessary to enable the court to acquire jurisdiction of an infant defendant, cannot be applied to this case, for the reason that in all those cases ¹⁰⁷ the question was whether the court had acquired jurisdiction of an infant defendant in proceedings instituted prior to the adoption of the Code of Procedure, where, as it is said, there was no statute or decision prescribing the mode in which infants could be made parties before the code—a circumstance which was pointedly referred to by Mr. Justice McGowan, in delivering the opinion of the court in *Tederall v. Bouknight*, 25 S. C. 275, and was again mentioned in *Rollins v. Brown*, 37 S. C. 345. Now, however, when, as in this case, the question arises as to whether the court had acquired jurisdiction of the person of an infant defendant in a proceeding instituted since the adoption of the code, which especially prescribes what shall be necessary in order to enable the court to acquire jurisdiction of the person of an infant defendant, the question must be determined by those provisions, without regard to what may have formerly been the rule. As

we have seen, looking to those provisions, we are unable to find any jurisdictional defect in the judgments here in question. On the contrary, there is nothing on the record to show any defect therein, and hence they cannot be regarded as void.

Our next inquiry is whether it has been shown, by evidence aliunde, that they are voidable. The only defect alleged is that one of the defendants—L. M. Blair—was a minor at the time the judgments were rendered, and that there was no guardian ad litem appointed to represent him. The fact that he was a minor does not appear upon the record, though that fact has been satisfactorily shown by the affidavits submitted in support of the motion. Nor does the fact that there was no guardian ad litem appointed to represent him appear upon the record, though that fact has likewise been made to appear satisfactorily. This, therefore, shows that there was error in rendering the judgments in question, for the code, in section 136, provides that when an infant is a party, he must appear by guardian ad litem. This renders these judgments voidable upon a proper proceeding and satisfactory showing for that ¹⁰⁸ purpose; and the only remaining question is, whether the showing made is sufficient to require the court to vacate said judgments. There is no doubt that this—a motion in the cause—is a proper mode of proceeding, and the inquiry is narrowed down to the question whether the showing made is sufficient to require the court to grant the relief asked for. As is said in 10 Encyclopedia of Pleading and Practice, 704: “An infant has in general no absolute right to avoid a judgment or decree against him, and even an irregular judgment will not be vacated as of course.” To same effect see Freeman on Judgments, secs. 151, 513; Black on Judgments, sec. 193. The case of *Syme v. Trice*, 96 N. C. 243, was in some of its features very much like the present. There the motion was to vacate a judgment obtained against a minor, a youth of eighteen years of age, not known to be a minor at the time, though that fact was afterward made to appear. The motion was refused, the court saying: “That he was an infant served with process did not render the judgment as to him void. At most, it was only irregular and voidable: Citing authorities. While the court will always be careful of the rights of infants, it will not in all cases set aside irregular judgments against them as of course. It will not do so where it appears from the record, or otherwise, that the infant suffered no substantial injustice; especially it will not when the rights of third parties without

notice have supervened." It is true that, in the case just referred to, the rights of third persons, who had bought at the sale made under the judgment sought to be set aside, were involved, while here such is not the case, but still, it seems to us that the principles upon which the court proceeded are applicable here. But we are not without authority in our own state on this point. In *Haigler v. Way*, 2 Rich. 324, the court, after holding that a judgment obtained against an infant, who did not appear by guardian, is erroneous, goes on to say that the court is not bound, after the infant has attained his majority, to set aside such a judgment upon the mere fact that he was an infant when it ¹⁰⁹ was obtained, but may consider lapse of time, the conduct of the defendant, and other circumstances, as having confirmed the judgment or rendered the interference of the court improper. In the light of these legal principles, let us proceed to examine the facts of this case as disclosed by the moving papers. Here was a young man, within a very few months of attaining the full age of twenty-one years, engaged in a mercantile business in partnership with his brother, who is conceded to have been of full age, who buys from the several plaintiffs goods, wares, and merchandise appropriate to be used in such mercantile business, and when he, with his partner, is sued for the price of such goods, sets up no defense, not even the fact that he was a minor and, therefore, not legally liable, but allows judgment to go by default. Things remain in this condition for a period of nearly seven years, when, being called upon to pay, he then, as he says, for the first time, learns that judgments have been recovered against him, and, after ineffectual efforts to compromise, institutes these proceedings to vacate these judgments—not upon the ground that the debts upon which the judgments rested were unjust, or not due, nor upon the ground that he was not duly served with the summons by which the actions were commenced, but solely upon the ground that no guardian ad litem had been appointed to represent him, although he did not see fit to avail himself of the privilege, accorded to him by the law, of applying for the appointment of such guardian, and relies entirely upon the failure of the plaintiffs to apply for such appointment, upon his neglect to make such application—although there is not only no evidence that the plaintiffs either knew or had any reason to suspect that he was a minor, but, on the contrary, the affidavits show that they did not know he was a minor, and the circumstances tend to show that they

had no reason to suspect that such was the fact, for he was then a grown man, within less than four months of attaining the full age of twenty-one years, engaged in business which held him out to the world as a person of full age. Then, too, his failure to take any step ¹¹⁰ to relieve himself of these judgments for a period of nearly seven years is a circumstance which does not recommend his claim to the favorable consideration of the court. True, he says he did not know of the existence of these judgments until a comparatively short time before these proceedings were instituted, yet he does not and cannot deny that he was served with the summons but a very few months before he attained his majority, and, therefore, as a matter of fact, he knew that he was sued, and the terms of the summons fully informed him what would be the consequence if he failed to answer; and while, as matter of law, he might not have been bound thereby so long as his minority continued, yet when he, very soon afterward, came of age, he must have known that judgment had gone against him. Here was an act done in a public office to which he had full access, and the rule of law is that an act done in a public office, open for the information of parties interested, must be taken notice of by them: *Payne v. Harris*, 3 Strob. Eq. 39, recognized and followed in several other cases; *Long v. Cason*, 4 Rich. Eq. 60; *Pettus v. Clawson*, 4 Rich. Eq. 92; *Fricks v. Lewis*, 26 S. C. 237; *Ariail v. Ariail*, 29 S. C. 84; *Boyd v. Munro*, 32 S. C. 249. And the later cases cited show that this rule applies even where the act done in a public office is not, as a matter of fact, known to the person to be affected by such notice. From the time, therefore, that the appellant, L. M. Blair, attained the age of twenty-one years, a period of more than six years, he must, under this rule, be regarded as affected with notice that these judgments had been recovered against him. It seem to us, therefore, that the appellant, L. M. Blair, has waited too long after he attained full age to make this motion, and that he has entirely failed to make such a showing as would entitle him to the relief asked for.

We have not deemed it necessary to consider such of the exceptions as impute error to the circuit judge in some of the reasons which he assigns for his conclusion. It is too well settled to require either argument or authority, ¹¹¹ to show that the province of this court is to inquire whether there is any error in the judgment or order appealed from, and not whether the reasons given for the conclusion reached are tenable.

The judgment of this court is, that the orders appealed from in each of the cases named in the title of this opinion be affirmed.

EVIDENCE—COMPROMISE.—Offers of compromise are not admissible in evidence against the party making them: *Harrington v. Lincoln*, 4 Gray, 563, 64 Am. Dec. 95; but statements of facts made in negotiations for compromises are admissible: *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74. See, also, *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454.

A JUDGMENT AGAINST AN INFANT duly served with summons, but without the appointment of a guardian ad litem, though irregular and erroneous, is not void: *Levystein v. O'Brien*, 106 Ala. 352, 54 Am. St. Rep. 56; *Manfull v. Graham*, 55 Neb. 645, 70 Am. St. Rep. 412.

JUDGMENTS AGAINST INFANTS—VACATING.—As a rule, an infant is bound by a decree against him as much as a person of full age, and can impeach it only upon grounds which would invalidate it if against an adult: *Harrison v. Wallton*, 95 Va. 721, 64 Am. St. Rep. 830. An infant does not have an absolute right to have a judgment against him set aside: *Manfull v. Graham*, 55 Neb. 645, 70 Am. St. Rep. 412; and if he has knowledge of an irregular and voidable judgment against him, he must move to avoid it within a reasonable time after attaining his majority: *Eisenmenger v. Murphy*, 42 Minn. 84, 18 Am. St. Rep. 493. See, too, *Childs v. Lanterman*, 103 Cal. 387, 42 Am. St. Rep. 121.

NOTICE—PUBLIC RECORD.—Parties are bound to take notice of facts exhibited in a public record: *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231.

SLOAN v. HUNTER.

[56 SOUTH CAROLINA, 385.]

DEBTOR AND CREDITOR—SLAVE DEBT.—A debt incurred in the purchase of slaves is collectible if not barred by limitation.

FRAUDULENT CONVEYANCES — PREFERENCES.—A debtor in failing circumstances may prefer his creditor by a confession of judgment, provided he does not thereby intend to delay or defraud his other creditors, and does not thereby secure to himself a direct advantage at the expense of his creditors.

EVIDENCE — DEPOSITION — NOTICE OF TAKING.—A deposition taken before A. J. Langley may be admitted in evidence, though the notice was to take testimony before Andrew Langley, provided both parties are represented by counsel at the taking of such testimony.

EVIDENCE—TRANSACTIONS WITH DECEDENT.—A witness may testify to a transaction or communication between a deceased person and another who is a party to the case, although the witness might, in a certain event, also become a party to the cause on trial.

EVIDENCE—HEARSAY.—If a witness testifies as of his own knowledge, the testimony cannot be excluded as hearsay, unless that fact is made to appear, although there is great probability that the information is really hearsay.

FRAUDULENT CONVEYANCES.—A confession of judgment on a debt incurred in the purchase of slaves, a sale of the debtor's land at a fair price, and an agreement between the purchasing creditor and the debtor before the sale to permit the latter to redeem and to remain in possession, do not amount to a fraud on his other creditors.

FRAUDULENT CONVEYANCES—ACTION TO ANNUL—PARTIES.—In an action to set aside a confession of judgment and deed thereunder as a fraud on creditors of the judgment defendant, the party in possession and the administrator and heir at law of the judgment creditor are necessary parties.

Ferguson & Featherstone, J. F. L. Caldwell, O. L. Schumpert, and Hunt & Hunt, for the appellants.

N. B. Dial and F. P. McGowan, for the appellee.

387 JONES, J. The plaintiff is a judgment creditor of Henry M. Hunter, deceased, and the defendants are the heirs at law and administrator of said deceased. The main object of the complaint is to set aside as fraudulent a confession of judgment by Henry M. Hunter to his brother, Robert C. Hunter, and the sale of a five hundred acre tract of land by the sheriff to Robert C. Hunter under said judgment, and a subsequent conveyance thereof to the defendant, J. H. Hunter, by J. H. T. Hunter, the only heir at law of R. C. Hunter, deceased. The circuit decree sets aside the said judgment and sale thereunder and the subsequent conveyance as fraudulent and void. The complaint further sought and the circuit decree adjudged a sale of this five hundred acre tract and three other tracts, designated as the one hundred and fifty acre tract, and the one hundred and thirty acre tract, and the fifty acre tract, as the property of said Henry M. Hunter, with a view to distribution among creditors. The real question in the case on the merits is whether the confession of judgment was made with intent to defraud the creditors of Henry M. Hunter; for if the confession was bona fide, and R. C. Hunter was the bona fide purchaser at the sheriff's sale, the creditors of Henry M. Hunter are in no wise concerned with the subsequent transfer of the heir at law of R. C. Hunter to the defendant, J. H. Hunter. Furthermore, if said confession and sale thereunder was not fraudulent, then the five hundred acre tract is beyond the reach of Henry M. Hunter's creditors, and plaintiff has a plain and adequate remedy at law to sell all the interest of Henry

M. Hunter in the other tracts. We, therefore, treat the case first on its merits.

The theory of the complaint is that the confession was ³⁸⁸ merely pretensive, and was made for the purpose of delaying and hindering the creditors of Henry M. Hunter, and with intent to secure said land to said Henry M. Hunter and his children. In sustaining the charge of fraud, the circuit judge was evidently influenced by the view that the confession was for a pretensive debt. But we find no evidence impeaching the existence or the bona fides of the debt. The confession recites that the notes for which it was made, aggregating six thousand and fifteen dollars and fifty-five cents, were given in lieu of a note for the purchase of slaves by James O. Duckett to R. C. Hunter, Duckett having resold the slaves to Henry M. Hunter, who assumed Duckett's liability. The existence of such a debt was also shown by the testimony of plaintiff's witness, Miss Kate Martin, who was employed in the household of Henry M. Hunter at the time of the confession. The circuit judge was in error in supposing that a slave debt was "uncollectible": *Calhoun v. Calhoun*, 2 S. C. 283; *Brewster v. Williams*, 2 S. C. 455; and there was no evidence that the claim was "out of date," and the law does not prevent one from acknowledging and paying a debt merely because it is old. To secure this bona fide debt, Henry M. Hunter had the right, though in failing circumstances, to prefer his brother by a confession of judgment, so far as the statute of Elizabeth or the common law is concerned, provided he did not thereby intend also to delay or defraud his other creditors, or did not thereby, as the price of the preference, secure to himself a direct advantage at the expense of his creditors: *McElwee v. Kennedy*, 56 S. C. 154. The land was sold at public outcry by the sheriff in 1883, when there existed plaintiff's judgment and a number of other judgments against Henry M. Hunter, including a confession of judgment by Hunter to M. S. Bailey for four thousand dollars, on the same day of the confession to R. C. Hunter. There was no evidence of any improper conduct of either Henry M. Hunter or R. C. Hunter at said sale. R. C. Hunter became the purchaser at five thousand three hundred and fifty dollars, a fair price for the land. It is true this amount was not ³⁸⁹ credited on the judgment, and that some years afterward this judgment was reversed by the administrator of R. C. Hunter for the whole amount, on default of Henry M. Hunter. But these facts do not show mala fides

in R. C. Hunter and Henry M. Hunter in the original judgment and sale by the sheriff thereunder. It is also true that Henry M. Hunter remained on the land from the time of sale to his death in 1893, but the circuit judge is mistaken in supposing that the testimony of R. Lee Hunter, who lived with his father, Henry M. Hunter, on the land until the death of his father, "shows that Henry M. Hunter was entitled to one-half of the rents," thus indicating that Henry M. Hunter had an interest in the land. R. Lee Hunter's testimony was to the effect that he and his father farmed the land together, that his father was to get half of the "profits," and that they paid rent for the land to J. H. T. Hunter, the only heir at law of R. C. Hunter. It is well settled that if Henry M. Hunter had conveyed the land directly or privately to R. C. Hunter and had remained in possession, such possession is not conclusive evidence of fraud, but may be explained: *Nelson v. Good*, 20 S. C. 231. The possession in this case is fully explained by the payment of rent to another as the owner. But, further, the sale to R. C. Hunter was a public sale, and, as shown in *Guignard v. Aldrich*, 10 Rich. Eq. 253, if the sale is otherwise fair, it is an insufficient badge of fraud for the purchasing creditor to permit the debtor to remain in possession. The court said: "Undue weight . . . has been attached to the fact that Harley remained in possession of the property after sale. The principle that vendors remaining in possession of the property is a badge of fraud does not apply to sheriff's sales. . . . Conceding the sale to have been fair and the prices paid full, and at that conclusion we have arrived, what mischief or injustice is there to anyone, if the defendant in execution is permitted by the purchaser to remain in possession of the property which has been sold?" But it is supposed that the testimony of Miss Kate Martin shows a corrupt agreement between Henry M. ³⁹⁰ Hunter and R. C. Hunter, by which the property was to be placed beyond the reach of creditors. Before referring to that testimony we dispose of certain preliminary questions as to its admissibility: 1. The testimony was taken *de bene esse* before J. A. Longley or John Andrew Langley, whereas it was noticed to be taken before Andrew Langley. As defendants were represented by attorneys at the taking of the deposition and were in no wise prejudiced or misled by the slight difference in the sound of the name given in the notice and the real name of the officer, we see nothing in this point. 2. It is objected that this testimony is obnoxious

to section 400 of the code, it being established that Miss Martin is a creditor of Henry M. Hunter, deceased, and could come into this case as a creditor under the calling in thereof. We are of opinion that since it does not appear that the witness was testifying as to a transaction or communication between the witness and the deceased, but was as to a transaction or communication between the deceased and another person, her testimony is not to be excluded under section 400: *McLaurin v. Wilson*, 16 S. C. 402; *Norris v. Clinkscales*, 47 S. C. 492. 3. The testimony was not liable to exclusion as hearsay, for while there is great probability that much of her testimony was founded on what she had heard, still it was given in answer to a question as to her knowledge, and if it was really hearsay, it was incumbent on the objector to make that fact appear to the court.

The testimony was as follows: "Ans. 5. Henry M. Hunter owed R. C. Hunter a debt called an old negro debt. The amount I do not know, but they compromised and agreed that the debt was three thousand six hundred dollars, as I remember it; it was agreed that this five hundred acre tract should be sold, and R. C. Hunter bid in the land, and was to take title in his own name and the taxes was to be paid in R. C. Hunter's name. R. C. Hunter agreed to give Henry M. Hunter time in which to redeem the land. Henry M. Hunter was to pay whatever amount he could each December, and when the ³⁹¹ three thousand six hundred dollars and interest were paid, R. C. Hunter was to convey the land to some one, to be held in trust for the children of said Henry M. Hunter—to protect the property to said children. Henry M. Hunter continued to live on said tract of land by reason of the above agreement." But this testimony does not justify an inference of fraud against other creditors, provided it be true, as we hold to be true, that the confession was for a bona fide debt, and the sale by the sheriff was at a fair price. R. C. Hunter, having fairly bought the land, could, if he desired, befriend the family of his unfortunate brother by allowing it to be redeemed for their benefit. Having the right to do as he pleased with his own, other creditors could not convert his generosity into fraud. In the case of *Guignard v. Aldrich*, 10 Rich. Eq. 253, the court, by Chancellor Dargan, said: "Suppose it to have been proved that Aldrich, before the sale, had said to Harley that if he purchased his property he would let him have it back and give him an opportunity of redeeming it; and that after his purchase

he had fulfilled this promise and agreement; and Harley had accordingly resumed the possession of his property—the sales being otherwise fair and the prices adequate—where is the fraud or vice of such an agreement? My impression is that such arrangements at the call of friendship are not at all infrequent, nor condemned by any legal or moral obligation.” Under our view of the evidence, the complaint should have been dismissed on the merits. But there is strong reason for holding that the statute of limitations and the laches of plaintiff should bar the action.

Furthermore, the proper parties are not before the court. It appears that Ursula Wilson is in possession of the one hundred and fifty acre tract, and that W. H. Workman is in possession of the fifty acre tract, claiming in their own right, and neither is made a party to this suit. Moreover, neither the administrator nor the heir at law of R. C. Hunter is before the court, and they are necessary parties to an action to set aside as fraudulent the judgment in favor of R. C. ³⁹² Hunter and the sale thereunder to R. C. Hunter: *Sheppard v. Green*, 48 S. C. 165.

The judgment of the circuit court is reversed and the complaint dismissed, without prejudice, however, to any rights which the children of Henry M. Hunter may claim to have in said land, as among themselves.

FRAUDULENT CONVEYANCES.—A CONFESSION OF JUDGMENT is not fraudulent if done fairly and in good faith to secure an honest debt, though also designed to give a preference: *Floyd v. Goodwin*, 8 Yerg. 484, 29 Am. Dec. 130. But see *Walton v. First Nat. Bank*, 13 Colo. 265, 16 Am. St. Rep. 200; *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 45 Am. St. Rep. 803.

FRAUDULENT CONVEYANCES.—LEAVING A DEBTOR IN POSSESSION of his property, or reserving to him any interest, benefit, or advantage out of the property conveyed, to the exclusion or injury of creditors, vitiates an assignment by him for the benefit of his creditors: See extended note to *Bank of Little Rock v. Frank*, 58 Am. St. Rep. 78, 79. Compare *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480.

SLAVE DEBT.—A promissory note for the purchase money of slaves sold after the date of the emancipation proclamation is valid: *McElvain v. Mudd*, 44 Ala. 48, 4 Am. Rep. 106.

STATE v. CHAPMAN.

[56 SOUTH CAROLINA, 420.]

CONSTITUTIONAL LAW—VIOLATION OF LABOR CONTRACT.—A statute making it a crime for a laborer to violate a contract with a land owner after receiving supplies is constitutional.

E. M. Rucker, Jr., for the appellant.

M. F. Ansel, solicitor, for the appellee.

421 McIVER, C. J. The sole question presented by this appeal is whether the acts of 1897—22 Stats., p. 457—under which the appellant has been convicted, is unconstitutional. That statute reads as follows: "That any laborer working on shares of crop, or for wages in money or other valuable consideration, under a verbal or written contract to labor on farm lands, who shall receive advances either in money or supplies, and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor, and on conviction shall be punishable by imprisonment for not less than twenty days nor more than thirty days, or to be fined in the sum of not less than twenty-five dollars nor more than one hundred dollars, in the discretion of the court; provided, the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses." From the language of this act it will be seen that the offense denounced is, not merely the violation of a contract by a laborer employed to work the lands of another, but the offense consists in receiving advances either in money or supplies, and thereafter willfully and without just cause failing to perform the reasonable service required of him by the terms of the contract. It is apparent, therefore, that this case differs widely from the case of *State v. Williams*, 32 S. C. 123, upon which appellant seems mainly to rely. There the defendant was indicted simply for a violation of the contract into which he had entered with the landholder, by willfully failing to give to the landholder the labor reasonably required of him by the terms of the contract, which was made a penal offense by section 2084 of the General Statutes of 1882. By that section it was made a penal offense for either party, the landholder or the laborer, to violate the contract therein referred to; but **422** as the statute discriminated between these two parties in fixing the amount of punish-

ment that might be imposed for the same offense, the court held that such discrimination rendered the statute unconstitutional. The offense for which the appellant has been convicted would not be complete, if the laborer, before receiving advances in money or supplies, had willfully and without just cause failed to perform the reasonable service required of him by the terms of the contract, for the gist of the offense is in failing to do so after he has received advances in money or supplies, made to him upon the faith that he would perform the reasonable services required of him by the terms of the contract. It is clear, therefore, that there is no discriminating feature in the act of 1897, and we do not see how there could be one, inasmuch as laborers never make advances either in money or supplies to landholders. If the laborer before receiving advances in money or supplies should violate the terms of his contract in the grossest manner, he could not be indicted under the act of 1897, but could only be prosecuted under the provisions of section 2084 of the General Statutes of 1882, as amended by the act of 1889 (20 Stats., p. 381), passed for the purpose of eliminating the constitutional objection in the section as it was originally enacted; and so the landholder, if he violated any of the terms of the contract, could only be prosecuted under the very same law, and subject to the very same punishment, as that provided for the laborer under similar circumstances. We are of opinion, therefore, that none of the grounds upon which the constitutionality of the act of 1897 has been assailed are tenable.

The judgment of this court is, that the judgment of the circuit court be affirmed.

CONSTITUTIONAL LAW.—A statute declaring that to be a crime which consists alone in the exercise of a constitutional right, as that of terminating a contract, is unconstitutional: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443.

SLOAN v. GIBBES.

[56 SOUTH CAROLINA, 480.]

NEGOTIABLE INSTRUMENTS — INDORSER'S AGREEMENT—EVIDENCE.—Parol evidence is admissible to show that indorsers of a note in blank agreed that the liability should be that of cosureties, and not of successive sureties.

NEGOTIABLE INSTRUMENTS—INDORSERS—PAYMENT. If a bank accepts in payment of a note the individual note of an indorser secured by mortgage, the latter occupies the position of one who has paid the note.

SURETYSHIP—CONTRIBUTION.—If a surety liable to contribution is insolvent, contribution must be in proportion to the number of solvent sureties.

NEGOTIABLE INSTRUMENTS.—PROTEST of note may be verbally waived.

NEGOTIABLE INSTRUMENTS—WANT OF PROTEST AS DEFENSE.—Failure to protest a note is no defense available to an indorser in an action on a special agreement for contribution as a cosurety.

NEGOTIABLE INSTRUMENTS—CONTRIBUTION BY INDORSER—INTEREST.—In an action by one indorser of a note for contribution by another as cosurety under a special parol agreement, only the legal rate of interest can be recovered, although the suing indorser has paid a higher rate.

L. F. Youmans and J. P. Thomas, Jr., for the appellant.

R. W. Shand, for the appellee.

485 JONES, J. In this case a first indorser in blank on a negotiable promissory note sues the second indorser for contribution, relying upon an alleged parol agreement, by which the indorsers, as among themselves, were to be liable jointly or as cosureties. The circuit court decreed for contribution, and defendant seeks to reverse on numerous exceptions. These we will not notice in detail, but will consider the principal and controlling questions raised by them.

1. The demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was properly overruled. The objection to the complaint was that it failed to allege any contract between plaintiff and defendant, and failed to state any facts from which any liability of defendant to plaintiff arises. It appears that an agreement to contribute is alleged with sufficient certainty and definiteness to avoid the demurrer. While in the case of *Black v. Columbia*, 19 S. C. 419, 45 Am. Rep. 785, the court, speaking of an allegation of an "understanding," said such word was equivocal,

or fell short of alleging a distinct and express contract, it must be observed that the court was speaking in reference to the complaint in that case, which alleged the plaintiff's "understanding." In this case, "the understanding between plaintiff and defendant" is alleged, and this understanding is subsequently in the same cause of action referred to as an "agreement and understanding." These allegations, with the other facts stated, were sufficient to disclose to the defendant the precise nature of the cause of action he was to meet.

2. There was no error in admitting parol evidence to show the alleged agreement. The admissibility of the testimony ⁴⁸⁶ is opposed by the appellant on two grounds: 1. That it is contrary to the statute of frauds, requiring an agreement in writing to show a promise to answer for the debt, etc., of another; and 2. That the evidence tended to alter, vary, or contradict the written instrument. We do not think the statute of frauds applies. In so far as any contract to pay the debt of another is concerned in this case the statute is satisfied by the indorsements in blank on the note, such signatures applying to the contract already written in the note, and to such contract as the parties authorized to be written above their signatures: 2 Daniel on Negotiable Instruments, sec. 1765; Perkins v. Catlin, 11 Conn. 213, 29 Am. Dec. 294; Taylor v. French, 2 Lea, 257, 31 Am. Rep. 611. We think, also, that parol evidence was admissible to show the real relation of the indorsers to each other. A regular blank indorsement on a negotiable promissory note ordinarily imparts a legal obligation to pay the note in default of the maker, after due diligence by the holder and due notice of the default to the indorser, primarily in the first indorser, and successively in following indorsers in their order. Whether this implication is conclusive and irrebuttable, or only prima facie, and subject to parol evidence showing the real relation of the parties, has been the subject of much diversity of opinion among the courts. But in this state we think the law favors the admission of such evidence as not in violation of the very salutary rule forbidding the altering, varying, or contradicting of a written instrument by parol evidence. In the case of Cathcart v. Gibson, 1 Rich. 10, the jury were charged that the legal effect of the contract implied from the indorsement might be varied by parol evidence, where, before any liability was incurred by either, they agreed in case of loss to contribute; and in that case, on page 13, the court of appeals said: "The fact that there was a previous agreement be-

tween the parties that in case of loss they should be liable to contribute as cosureties is negated by the verdict of the jury. If any such agreement or understanding had been proven, I think there is no doubt the ⁴⁸⁷ plaintiff should have recovered, and the jury were so instructed." While the point under consideration was not squarely before the court, it cannot be doubted that the court regarded the instruction to the jury proper, and the effect of the case was to hold the first indorser primarily liable, and to deny contribution by the second indorser, because the jury, under the instruction and the evidence, found as a fact that there was no agreement to contribute. In the case of *Smith v. Tunno*, 1 McCord Eq. 443, 16 Am. Dec. 617, it was expressly decided that parol evidence was admissible to show that a party to a bond signed as surety where the rights of principal and surety were involved, on the ground that the relationship of the obligors as between themselves was extrinsic of the written agreement. We see no reason why this principle may not apply as between indorsers on a negotiable instrument, to show whether their liability was as joint sureties or as successive sureties. The evidence was not designed to vary the legal import of the note as against a holder for value, but to show an agreement collateral to the note as between the sureties thereto. See, also, the case of *Anderson v. Pearson*, 2 Bail. 107, where it was held competent to show by parol that the one surety to a note signed as cosurety on an agreement of the other surety to indemnify him. The case of *Aiken v. Barkley*, 2 Spear, 747, 42 Am. Dec. 397, cited by appellant, does not conflict with this view. That case decided that indorsers do not stand in the relation of cosureties to each other because of the fact that the indorsements were for accommodation and not for value. But the case seems to recognize that indorsers might engage between themselves for contribution, and that the legal effect of a blank indorsement may be subject to a parol special agreement for contribution. In the case of *Rugely v. Davidson*, 2 Mills, 33, a suit by an indorsee against an indorser after maturity, a majority of the court held parol evidence admissible to show a special agreement that the indorsee was not to resort to the indorser until after suing the maker and failure to collect. It must be said, however, that in that case the court deemed ⁴⁸⁸ it material that the indorsement was made after maturity. Tending to the view we have announced, in *Kaphan v. Ryan*, 16 S. C. 352, parol evidence was received to prove an agreement in which a

written instrument originated and of which it constituted only a part, so as to show that the written instrument was only intended as a security for future advances; in *Fullwood v. Blanding*, 26 S. C. 312, to explain the object and intent of an assignment of a bond and mortgage; in *Calvert v. Nickles*, 26 S. C. 310, to show the manner and to whom purchase money or the consideration expressed in a deed of conveyance was to be paid; in *McAteer v. McAteer*, 31 S. C. 313, to show that a note and mortgage were merely intended to save harmless, and indemnify the payee for contingent liabilities as surety which he did not pay. These and many other cases in this state show that parol evidence is admissible to impeach the consideration and delivery of an instrument in writing. The mere writing of a blank indorsement on a negotiable note does not constitute the contract. There must be, also, a consideration and a delivery to complete it, and those matters are subject to parol evidence. In this case the special agreement sought to be proven by parol may also fairly be said to relate to the consideration or inducement under which the plaintiff indorsed and delivered the note to the defendant for negotiation for the accommodation of the maker. While a number of courts in other jurisdictions hold that the legal import of a blank indorsement cannot be varied by parol evidence, showing a special contemporaneous agreement of the kind in question, many other cases might be cited to sustain our view: *Phillips v. Preston*, 5 How. 279; *Ross v. Espy*, 66 Pa. St. 481, 5 Am. Rep. 394; *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733; *Graves v. Johnson*, 48 Conn. 160, 40 Am. Rep. 162, and note; *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604; *Brewer v. Woodward*, 54 Vt. 581, 41 Am. Rep. 857; *Smith v. Morrill*, 54 Me. 48; *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Cole v. Smith*, 29 La. Ann. 551, 29 Am. Rep. 343; *Taylor v. French*, 2 Lea, 257, 31 Am. 489 Rep. 609; 7 Ency. of Law, 359; 4 Ency. of Law, 487; *Daniel on Negotiable Instruments*, secs. 703, 720 A.

3. The next question is whether the testimony established the alleged agreement between the indorsers to be liable as cosureties. The circuit court found in favor of said agreement, and, treating this case as one in equity, as all parties have assumed, we are to inquire if the conclusion of the circuit court is against the preponderance of the evidence. While in the circuit court the burden was upon the plaintiff, respondent, to establish the special agreement, the burden is now upon the

defendant, appellant, to show error in the conclusion of the circuit court finding such agreement. The plaintiff testified most positively that such agreement was had; and while this is denied by the defendant, the circumstances all corroborate the plaintiff's view. It is not disputed that plaintiff and defendant were stockholders and directors of a corporation known as the Richland Wine Company, the defendant being its president. This company was indebted to the Central National Bank of Columbia, South Carolina, by overdraft, and to raise funds to cover this, the company, by W. H. Gibbes, its president, made its note payable to the order of plaintiff for fifteen hundred dollars, which note was indorsed in blank as follows: John T. Sloan, Jr., W. H. Gibbes, E. R. Arthur. In this form the note was discounted at the bank in the hands of W. H. Gibbes, and the proceeds applied by Gibbes to the indebtedness of said company. It appears clearly that the plan adopted by the parties to pay the company's indebtedness was the note in question, with the expectation that all the directors of the company would indorse it. After the note was drawn and indorsed by Sloan, Gibbes, and Arthur, three of the directors, the defendant carried the note to the other directors, who declined to sign. When the defendant requested Mr. Allen J. Green, one of the directors, to indorse the note, he represented to Mr. Green that the overdraft at the Central National Bank was to be taken up by this note indorsed by the directors. The other directors refusing to indorse, the note was discounted ⁴⁹⁰ with the three indorsers named. It is thus made manifest that the plan of indorsement by all the directors to pay the company's indebtedness was intended to be a joint indorsement to provide for the payment of a debt which all the indorsers as stockholders and directors had an interest in common to have paid. It is not at all probable that an experienced lawyer, as is the plaintiff, would have become first indorser under such circumstances, unless there was an agreement such as he asserts. The defendant, after stating that the note had been indorsed by Sloan, himself, and Arthur, and then was carried by him to the other directors for their indorsement, and that they declined, testified that he carried the note back to plaintiff and told him that the other directors would not indorse, and asked him what was to be done, and that plaintiff told him that he did not see anything else but just to give that note to the bank to protect the overdraft, and that he did so. From defendant's own testimony, we are bound to infer

that when the indorsements by plaintiff and defendant were made, both parties understood that all the directors would sign jointly, and we cannot see in what took place afterward any different understanding or agreement between the parties to the note. Indeed, the negotiation of the note by the defendant, and the application by him of the proceeds to a debt, which concerned him, as stockholder and director as well as the plaintiff, indicate very strongly a joint indorsement for a common interest. We do not think, as argued by appellant's counsel, that the payment of the whole by the plaintiff to the bank, indicated that he conceived himself primarily liable as between himself and the defendant. The bank was no party to, and had no knowledge of, the special agreement, and had the right to compel payment from the first indorser. But, on the other hand, it is a fact of some importance that when plaintiff, before bringing suit, wrote to defendant asking a settlement of the matter, defendant replied, declining to assist or contribute on other grounds than the primary liability of plaintiff as first indorser, and without denying the agreement to which his ⁴⁹¹ attention was called. Of course, it is not a pleasant duty to decide a question of fact between gentlemen of the high character and intelligence of the parties before the court, but it cannot be shirked. We concur with the circuit court in the conclusion that there was, in fact, a special agreement between plaintiff and defendant when they indorsed the note to become liable to each other as cosureties in the event of payment by either.

4. Does the evidence show that the plaintiff has paid the note, so as to authorize a suit by him for contribution? We think so. The original note was executed October 23, 1891, at six months, for fifteen hundred dollars, and was renewed in same form for fifteen hundred and fifty-six dollars and forty cents, July 5, 1892, payable at ninety days, without any evidence of any understanding or agreement among the parties different from the original agreement. At the insistence of the bank, this renewal note was taken up by plaintiff on April 21, 1894, with interest, the same having been included by plaintiff in another note to the bank, including other indebtedness, secured by a mortgage of real estate and accepted by the bank as payment of renewal note. The renewal note, under the circumstances, was not a payment of the original obligation, but was a mere continuance of the original rights of the parties—*National Bank v. Gunhouse*, 17 S. C. 489—but when the bank

accepted plaintiff's individual note, secured by mortgage, as payment of the renewed note, plaintiff then certainly occupied the position of an indorser who had paid the note.

5. The next matter we notice is the measure of the liability for contribution. The circuit court has found that the third indorser, Arthur, was dead and insolvent, and this fact is not now questioned. In case any surety liable for contribution is insolvent, the rule is that contribution must be in proportion to the number of solvent sureties: *Harris v. Ferguson*, 2 Bail. 397, 401; *McKenna v. George*, 2 Rich. Eq. 22; 1 Story's Equity Jurisprudence, par. 496; 7 Ency. of Law, 2d ed., 341.

6. Appellant makes the point that the failure of the bank ⁴⁹² to protest the note for nonpayment, and give notice to indorsers, exonerates defendant from liability for contribution. It appears that, as matter of fact, the note was not protested, but evidence was offered to show a parol waiver of protest by plaintiff and defendant. The parol waiver by plaintiff was clearly established, and it cannot be doubted, especially in view of the rule above announced as to the admissibility of parol evidence, that a verbal waiver of protest may be made. Mr. Daniels, in his *Negotiable Instruments*, section 1093, states that a verbal waiver of protest is as effectual as a written one. So if plaintiff waived protest and was liable and compelled to pay, his right to contribution was complete, even though the bank, without fault of Sloan, may have failed to protest against the other indorsers and in the absence of any waiver by them. While such a defense might avail defendant in a suit by a holder against him as indorser, yet it ought not to avail in this suit, where he is sought to be made liable on a special agreement for contribution as a cosurety.

7. As to the correct amount which defendant should contribute. In reference to the sum of twenty-four dollars and ninety-five cents, which appellant thinks should have been credited on the amount paid by plaintiff, it appears that the Central National Bank obtained a judgment against the Richland Wine Company on the said note, that subsequently a mortgage on the real estate of the company was foreclosed, and the property sold and was purchased by plaintiff, and that of the purchase money, after paying the mortgage debt and costs of foreclosure, the sum of twenty-four dollars and ninety-five cents remained in plaintiff's hands applicable to the judgment on said note. We presume the circuit court did not give any credit for this sum because it was first applicable to the costs

of the judgment against the wine company, and was probably not more than adequate for this purpose. But as the brief does not show the amount of such costs, we are unable to say whether there was any error in failing to allow any credit from that source. The circuit court, no doubt, inadvertently treated the note paid by plaintiff as calling for ⁴⁹³ fifteen hundred and sixty dollars and forty cents, instead of fifteen hundred and fifty-six dollars and forty cents, the correct amount, and calculated interest on the former sum from October 6, 1892, its maturity, to April 21, 1894, when paid, at eight per cent per annum. While the evidence shows that plaintiff actually paid interest at that rate, yet as he was only legally liable to pay seven per cent interest, defendant should not be held liable for the higher rate. This, as we understand, is conceded by respondent. The correct amount which defendant should pay plaintiff is eleven hundred and sixty-four dollars and nine cents, instead of eleven hundred and eighty-eight dollars, as found by the circuit court.

The judgment of the circuit court, modified as above indicated, is affirmed.

EVIDENCE.—IF COMMERCIAL PAPER IS INDORSED in blank, parol evidence is admissible to show that the terms of the agreement between the parties are other and different from those which arise by presumption of law: *United States Nat. Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390. See, too, *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507.

NEGOTIABLE INSTRUMENTS—PAYMENT.—A mortgage given by an indorser to secure the indorsed note does not operate as payment, nor release him from liability: *Ainslie v. Wilson*, 7 Cow. 662, 17 Am. Dec. 532.

NEGOTIABLE INSTRUMENTS.—WAIVER OF PROTEST may be oral: *Annvile Nat. Bank v. Kettering*, 106 Pa. St. 531, 51 Am. Rep. 536. But see *Glidden v. Chamberlin*, 167 Mass. 468, 57 Am. St. Rep. 479, and note.

CONTRIBUTION—INSOLVENT SURETIES.—Contribution, in equity, is based upon the number of solvent cosureties—that is, the insolvent ones are excluded, and the burden is distributed between the solvent: See extended note to *Culliford v. Walser*, 70 Am. St. Rep. 453.

McGHEE v. WELLS.

[57 SOUTH CAROLINA, 280.]

FRAUDULENT CONVEYANCES—EVIDENCE.—DECLARATIONS made by a husband at the time of accepting a deed as to whose money was being paid therefor, and also the declaration of his attorney made at the time that the husband could convey to his wife, are competent evidence to show the character of the husband's possession, in an action to set aside the deed made by the husband to the wife, as in fraud of his creditors.

EVIDENCE—INTENT.—One may testify as to the intent with which he did an act charged as fraudulent.

WITNESSES—EVIDENCE.—The condition of a witness' health may be shown to explain his demeanor while on the witness stand.

TRIAL.—INSTRUCTIONS during the examination of a witness that a question of resulting trust, erroneously submitted to the jury at a former trial was not to be considered, but that the question of fraud was, is not a charge upon the facts.

FRAUD.—INADEQUACY OF PRICE does not mean an honest difference of opinion as to price, but a consideration so far short of the real value of the property as to startle a correct mind.

FRAUDULENT CONVEYANCES—BADGES OF FRAUD.—If a husband while in debt conveys property to his wife, his retention of its possession is a badge of fraud, as are also the nondelivery of the deed to the wife and the delay in recording it.

VENDOR AND PURCHASER.—SUBSEQUENT PURCHASERS with actual notice of the existence of a deed are not innocent purchasers, though such deed is not recorded.

SUBSEQUENT CREDITORS.—Entry of judgment subsequent to a deed and its record does not constitute the judgment creditor a subsequent creditor, unless the debt upon which the judgment is based arose subsequently to the execution of the deed in question.

NOTICE.—ACTUAL NOTICE supplies the place of recording.

APPEAL—NEW TRIAL.—If there is evidence tending to sustain the verdict, and the trial court refuses to grant a new trial, although differing from the jury on the facts, such refusal is not reviewable error.

Graydon & Giles and Parker & Green, for the appellants.

L. W. Perrin and Sheppards & Grier, for the appellee.

282 JONES, J. This is the second appeal from judgment and verdict in favor of the defendant: McGhee v. Wells, 52 S. C. 472. The action was for the recovery of real property. The plaintiffs claimed under a sheriff's deed, dated March 21, 1895, made pursuant to execution sale on judgment entered against J. W. Wells, the defendant's husband, on October 30, 1891. In support of her claim of title, the defendant introduced a deed to her by said J. W. Wells, dated May 18, 1891, probated June

30, 1893, and recorded July 1, 1893. This on its face showed a prior deed from the common source in favor of the defendant. The plaintiffs, however, attacked this deed on the ground of fraud, and this issue of fraud was the main contention.

Appellants' second, third, fourth, fifth, sixth, and seventh exceptions relate to rulings on the admissibility of testimony. The first four exceptions under this class relate to the admission of statements made by J. W. Wells to C. A. C. Waller, at the time of the delivery to him of a deed to the premises by the executors of James A. Bailey, from whom Wells received title to the lot in question. The sale of the estate lands of James A. Bailey was in September, 1888, but the date of the deed by the executors to J. W. Wells was November 20, 1889. Defendant having offered testimony tending to show that the lot in question was bought by Wells for his wife and with her money, proposed to prove the declarations of Wells, made when the executor's deed was delivered to him. The specific question was, "What objection was made to it [the deed] at the time that it was offered?" Plaintiffs' objection to this question was overruled and the witness answered, "My objection was that I wanted it made to my wife, and Mr. Bailey said that he could not make another, that it would cost him three dollars, and Mr. Waller advised me just to make title to my wife." The witness C. A. C. Waller was also permitted, over objection, to make a similar statement as to the objection to the deed raised by Mr. Wells. We do not think the court erred in permitting the testimony. The question was whether J. ²⁸³W. Wells had a fraudulent purpose in conveying the property to his wife, in May, 1891. The evidence tended to show that by accepting the deed in his own name in November, 1889, pursuant to a purchase for his wife in 1888, he deemed himself a trustee or mere conduit of the property for his wife. It was relevant, therefore, to go to the jury on the question whether he conveyed to his wife merely to carry out the trust, or whether he did so with intent to defraud the plaintiffs. The declaration was made at the time of the delivery of the executor's deed to Wells and his acceptance thereof, and was explanatory thereof, and tended to show the character of his possession at the time of the conveyance to his wife.

The sixth exception complains that J. W. Wells was permitted to answer the question, "What purpose did you have when you executed that deed?" Manifestly, there was no error in allowing such a question. Wells' purpose in executing the

deed was the very thing the jury were asked to determine. What credence the jury would give to Wells' statement of his purpose was wholly for them.

The seventh exception complains that the court erred in allowing defendant's counsel to ask J. W. Wells as to his physical condition at the time of the trial. If the matter was irrelevant, it was harmless. But for aught we know, it may have been relevant to explain the manner of the witness on the stand, which counsel may have deemed proper to explain, in order not to be prejudiced thereby. This seems to have been the reason of the court in permitting this question.

The next class of exceptions we will consider are those relating to the charge of the judge. The first and nineteenth exceptions impute error in the following remarks of the judge to the jury during the examination of the witness C. A. C. Waller: "On the 20th of November, 1889, this deed was made to Mr. Wells. Thereafter he got indebted to these parties. In November, 1889, the ²⁸⁴ deed was made by Bailey to Wells. After that date Wells became indebted to McGhee and Thompson, but before their claims were reduced to judgment, the deed was made to his wife, and these creditors went ahead and sold the land as if the land had never been deeded to his wife, and claimed that it belonged to them; but Mrs. Wells says that the transaction between her husband and herself was a bona fide transaction, and that is for you, and that is all for you, to consider and settle; but the question as to the resulting trust is not for you to consider at all." It is alleged that these remarks were a charge on the facts and in violation of the constitution, being a statement to the jury that the deed from Wells to his wife was made before the claims of the plaintiffs were reduced to judgment; whereas, the contention of the plaintiffs was that the deed was made after the judgment, and dated back for a fraudulent purpose. Without some explanation, these remarks might be objectionable; but in view of the circumstances, we do not think they fall under the inhibition of the constitution. These expressions are used during the examination of Mr. Waller in behalf of the defendant, and were merely intended to direct the mind of the jury to the particular issue of fraud, and to exclude them from considering the matter of resulting trust, which had been erroneously submitted to a jury in the former trial. The remarks were made in connection with the ruling of the court as to the admissibility of the declarations of Mr. Wells to Mr. Waller when the

executor's deed was delivered. The judgments and the deed had already been introduced in evidence, and on their face showed that the deed antedated the judgments; and at that stage of the trial no evidence had been offered to show that the date of the deed to defendant was different from what the document purported. Such incidental remarks based upon the relative dates of the documents before the court could hardly be deemed a charge to the jury on the facts.

The eighth exception assigns error in the following charge to the jury: "What does the law mean by an inadequate ²⁸⁵ price? It does not mean difference of opinion as to price, but it means such a gross inadequacy that it is such as to startle the mind of this jury, but no other jury or judge, or anybody else." The court had already charged the request of plaintiffs as follows: "Grossly inadequate consideration does not mean simply less than the actual value of the property. It means a consideration so far short of the real value of property as to shock a correct mind." In the case of *McPherson v. McPherson*, 21 S. C. 270, this court approved as correct a charge as follows: "A consideration about which persons may differ as to whether it is adequate or otherwise, is not such a one as will avoid a deed. The term used is 'grossly inadequate consideration,' etc. It must be a consideration so far short of the value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust." We cannot see that the charge complained of is materially different from what appellant desired to have charged and did have charged.

The ninth exception alleges error in charging the jury as follows: "The second badge is this, that the husband was then in debt to the plaintiffs, and no charge was to be made, etc. It is for you to say whether it is a badge of fraud or not." It is claimed that this charge improperly left it to the jury to say whether retention of possession by a grantor after sale is a badge of fraud or not; whereas he should have charged as matter of law that such retention of possession is a badge of fraud. The whole charge of the judge, however, shows that the exception is not well taken, for he, immediately after the remarks complained of, said: "The third badge is the nondelivery of the deed to the wife and the delay in recording. If you are satisfied that those things are all proved, the law says that those are badges of fraud, and the law says, if they are true, that the transaction is a fraudulent transaction unless

they have not been proved. If you conclude that these badges do exist, but that they have been explained to your satisfaction, the ²⁸⁶ jury may then conclude that what looks like a badge of fraud is really no badge of fraud." Then, in his tenth exception, appellant complains of the sentence last above quoted, on the ground that it should not have been left to the jury to say whether or not those badges of fraud had been satisfactorily explained, when there was no evidence to explain them. But it cannot be fairly said that there was no evidence offered to explain those matters, and whether the evidence was sufficient to explain was wholly for the jury.

The eleventh, twelfth, thirteenth, and fourteenth exceptions relate to refusals to charge specific requests on the subject of agency and the general charge of the court on that subject. The specific requests were as follows: "That if the jury find from the evidence that a settlement was made by J. W. Wells and the plaintiffs, through their attorney, of the matters in dispute between them, whereby it was agreed that the lot in question was to be turned over to the plaintiffs, and that the plaintiffs parted with anything of value in consideration of said agreement, then the defendant is estopped to claim the land in dispute, if the said settlement was made by the said J. W. Wells as the agent of the defendant. "That if the jury find from the evidence that such settlement was made by J. W. Wells as the agent of the defendant, then the said defendant is bound thereby, even though the said J. W. Wells exceeded his authority in making the said settlement, unless the plaintiff had knowledge that he was exceeding his authority." "That if the jury find from the evidence that the defendant authorized J. W. Wells to make a settlement of the matters in dispute with the plaintiffs, then she is bound by the acts and declarations of the said J. W. Wells in making said settlement." The judge, as to these requests, said he could not charge them in the language used, but would charge on the subject in his own language, which was as follows: "Now about this question of agency, I charge you this: A person may act for himself, or he may act through another. If he act through another, that other is called the agent, and he is ²⁸⁷ called the principal. The power of the agent may be general or it may be special. It is general when the agent is empowered to do a particular thing or many things in any way necessary or proper to accomplish the end. It is special when the agent is empowered to do a particular thing or many things in a limited way.

The jury must determine the character of the agency from the testimony. If general, the principal is bound if the agent exceed his authority, and the other party did not know it. If special, the agent must follow his instructions, else the principal will not be bound." There was testimony to the effect that Wells had a settlement with plaintiffs' attorneys of the said judgment after the sheriff's sale to the plaintiffs of the lot in question, in which settlement Wells got credit on the judgment for plaintiffs' bid at the sale, and that Wells agreed to turn over said lot to the plaintiffs. But beyond the mere act or declaration of Wells, which was objected to, there was no evidence at all that the defendant authorized Wells to so deal with the property. Hence, there was no basis in the evidence for a charge as to agency. Indeed, plaintiffs' contention that the deed by Wells to the defendant was void for fraud is inconsistent with the view of agency, which assumes a valid title in the defendant and that she authorized her agent to convey to plaintiffs. The practical effect of submitting the matter of agency as such to the jury, even if the evidence warranted would be to submit to them whether plaintiffs were entitled to recover the land upon the ground that defendant ought specifically to perform her contract to convey, made through an agent, or whether she is estopped to assert her title, because of an alleged agreement to convey by her agent. In so far as the evidence of said settlement by J. W. Wells had any tendency to establish the issue of fraud in the deed by Wells to the defendants, it went to the jury under the charge of the court on that issue. What has been said renders it unnecessary to discuss whether the requests and the charge embodied correct propositions of law as to agency. It is sufficient to say that appellants suffered no injury by said refusal and by said charge.

288 The twentieth and twenty-first exceptions will next be considered. The first mentioned alleges error in charging the jury as follows: "If a subsequent purchaser has actual notice of the existence of the deed before purchasing, such notice is sufficient though the deed is never recorded." It is contended that the court ought to have charged that even if the deed was made before the date of the judgments, still, if it was not recorded within forty days from its execution, it was void as to subsequent creditors, and that the plaintiffs were subsequent creditors, if their demands were reduced to judgment before the deed was recorded. The twenty-first exception imputes error in charging that if the deed was made by J. W. Wells to

his wife before the date of plaintiffs' judgment and the sale was bona fide, the plaintiffs could not recover, the error assigned being substantially the same as pointed out in the twentieth exception. The undisputed evidence was that defendant's deed was recorded before the judgments in favor of plaintiffs were rendered, that actual notice of it was given at the time of the sale, and that the demands of plaintiffs upon which the judgments were based arose prior to the date of defendant's deed. The term "subsequent creditors" means creditors whose debts were contracted subsequent to the deed in question: *King v. Fraser*, 23 S. C. 543; *Carraway v. Carraway*, 27 S. C. 576; *Armstrong v. Carwile*, 56 S. C. 471. It follows, of course, that the entry of judgment subsequent to the deed and its record will not constitute the judgment creditor a subsequent creditor, unless the debt upon which the judgment is based arose subsequent to the deed in question. The language complained of in the twentieth exception is not objectionable, for there is no doubt that actual notice supplies the place of recording. We do not find that the court charged in the broad terms alleged in the twenty-first exception, but if it is to be considered only in reference to the rights of plaintiffs as subsequent creditors under the recording act, we find no error in it.

The remaining exceptions relate to the refusal of the motion ²⁸⁹ for a new trial. It is not error of law for the circuit court to refuse a motion for a new trial, even though the court, if trying the facts, would have reached a different conclusion on the evidence from the jury. It is no abuse of discretion for a trial judge to decline to substitute his judgment on the facts for that of the jury; for if it were a rule of law that new trials must be granted whenever the court does not coincide with the jury on the facts, then the granting of new trials for errors of fact would not rest as it does in the sound discretion of the trial court. Whenever there is no evidence to support the verdict, it would be error of law to refuse a new trial, or if the refusal of a new trial is based upon an erroneous view of the law, such refusal is reviewable here; but where there is evidence tending to establish the result of the verdict, and the trial court refuses to disturb the verdict, although differing from the jury on the facts, such refusal is not reviewable here. We have examined the evidence with a view to ascertain if there is absolute want of evidence tending to

support the verdict, and we are unable to say that there is such want of evidence.

The judgment of the circuit court is affirmed.

FRAUDULENT CONVEYANCES—EVIDENCE OF INTENT.—When a sale of personal property is attacked as having been made with intent to hinder, delay, and defraud creditors, the seller may testify as to whether or not such was his intent: *Gardom v. Woodward*, 44 Kan. 758, 21 Am. St. Rep. 310, and the extended note thereto.

FRAUDULENT CONVEYANCES.—THE DECLARATIONS of a vendor, not made in the presence of the vendee, are competent to show the fraudulent intent of the former in making a conveyance to the latter: *Guidry v. Grivot*, 2 Mart. N. S., 13. 14 Am. Dec. 193, and note. See the note to *Horton v. Smith*, 42 Am. Dec. 631-633, on declarations of a vendor to show fraud, and the note to *Brown v. Mitchell*, 11 Am. St. Rep. 757-759, on evidence in cases of fraudulent conveyances.

FRAUDULENT CONVEYANCES—BADGES OF FRAUD.—A grantor retaining possession as before the conveyance, or keeping the deed unacknowledged and unrecorded for a considerable time, is a badge of fraud: Notes to *Brown v. Mitchell*, 11 Am. St. Rep. 759; *Redfield v. Buck*, 95 Am. Dec. 246.

FRAUDULENT CONVEYANCES.—INADEQUACY OF PRICE in the sale of property by an insolvent debtor is not sufficient alone to raise a legal inference of fraud, unless so grossly inadequate as to strike the understanding at once with the conviction that the sale never could have been made in good faith: *State v. Mason*, 112 Mo. 374, 34 Am. St. Rep. 390; note to *Kuykendall v. McDonald*, 57 Am. Dec. 217.

UNRECORDED DEEDS—NOTICE TO PURCHASERS.—To entitle one to invoke the aid of the rule that protects a bona fide purchaser against a prior unrecorded deed, he must make it appear that he made his purchase before he had notice of such prior equity: See the extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 290. Moreover, actual notice is not necessary; any fact or circumstance coming to the knowledge of a subsequent purchaser which would put a prudent man on inquiry, and if pursued would lead to actual notice of a prior unrecorded deed, is sufficient to invalidate a subsequent conveyance: *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281. Notice of an unrecorded conveyance may be imputed to a subsequent grantee from evidence of his admission that he knew his grantor did not own the land: *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159.

FRAUDULENT CONVEYANCES.—A JUDGMENT recovered subsequently to a fraudulent conveyance, and based upon an indebtedness contracted in part before and in part thereafter, is a lien upon the property of the judgment debtor only to the extent of the indebtedness contracted prior to the fraudulent conveyance: *Henderson v. Henderson*, 133 Pa. St. 399, 19 Am. St. Rep. 650. Compare *Usher v. Hazeltine*, 5 Greenl. 471, 17 Am. Dec. 253.

STATE v. TAYLOR.

[57 SOUTH CAROLINA, 488.]

WITNESSES—OPINION AS EVIDENCE.—A witness is competent to give his opinion as to the tone of voice in which he has heard a person speak.

RAPE.—EVIDENCE of the reputation of the house in which the prosecutrix for rape lives with others is not competent evidence.

RAPE—EVIDENCE—OPINION.—If, in a prosecution for rape, all of the circumstances, including the distance of the road from the spot, the nature of the time, and others, have been given to the jury, it is harmless error to refuse to allow a witness to give his opinion as to whether the prosecutrix's cry of distress could have been heard by a person passing along such road at the time.

RAPE—EVIDENCE—REPUTATION FOR CHASTITY.—Inquiry as to the reputation of the prosecutrix in rape for chastity must relate and be confined to such character prior to the alleged crime.

WITNESSES—PRESUMPTION.—There is no presumption that a witness, while testifying, is telling the truth.

RAPE—BURDEN OF PROOF—REASONABLE DOUBT.—If a defendant charged with rape admits the connection, but denies the rape, he does not set up an affirmative defense, and it is still incumbent on the prosecution to prove all the elements of the crime charged, including the issue as to consent, beyond a reasonable doubt.

Purdy & Reynolds, for the appellant.

J. S. Wilson, solicitor, for the state.

184 JONES, J. The defendant was convicted and sentenced under an indictment for rape, and appealed to this court. At the preceding term this court passed an order suspending the appeal to enable appellant to move before the circuit court for a new trial upon the ground of after-discovered evidence. Such motion was made before Hon. W. C. Benet, presiding judge, and was refused by him, and appellant has appealed also from said order of refusal. Both appeals were heard together. We will consider first the appeal from the judgment. The exceptions relate to the rulings of the court as to the admissibility of testimony and to the charge to the jury.

1. It was not error to permit the state's witness, Myers, to testify as to the tone of voice in which the prosecutrix called out when the prosecutrix and defendant were overtaken in the road, the witness stating that she was "halloing like she was in distress," "it seemed very distressful to me." This kind of testimony falls under the exceptions to the rule excluding

the mere opinion of a nonexpert witness. While the testimony involved to some extent the opinion of the witness, it was the result of ⁴⁸⁵ his observation of a condition of things which he could not otherwise reproduce to the jury, unless he had perfect faculties for imitation of the voice of another, a feat far beyond most witnesses: *State v. James*, 31 S. C. 233.

2. The second exception complains of error in permitting the solicitor to put leading questions to the witness, Nelson. This exception was not argued, although it was not abandoned. It is sufficient to say that it is not well taken. Even if the question objected to was leading, it was neither repeated nor answered after the objection was overruled.

3. There was no error in excluding the testimony of defendant's witness, Dr. Anderson, as to the reputation of the house in which the prosecutrix lived prior to the alleged rape. The prosecutrix was between fifteen and sixteen years old at the time of the alleged rape, and lived in the house with her grandmother, mother, and sisters and brother. While the reputation for chastity of the prosecutrix was a legitimate subject of inquiry, as bearing on the issue whether she consented to the act, it is too far removed to extend the inquiry to the reputation of the house in which she lived with others. The evidence as to reputation must be confined to what is said of her.

4. The circuit court correctly excluded the testimony of W. J. Reese as to the reputation for chastity of the prosecutrix, which he heard discussed after the occurrence under investigation. It is not only well settled, but fair, that such inquiry must relate to the reputation or character acquired prior to the alleged crime, for the after-reputation may have resulted from the claim of defendant and his friends that she consented to his act.

5. The fifth exception alleges error in excluding the testimony of W. J. Reese as to whether a person passing along the road near the spot where the rape was alleged to have occurred could have heard a cry of distress from the prosecutrix. All of the circumstances having been given to the jury, the distance of the road from the spot, the nature of the time, whether stormy or not, etc., the ⁴⁸⁶ jury were as competent as the witness to draw a conclusion whether a cry of distress from one like the prosecutrix could have been heard by a person of ordinary faculties. Besides, the appellant secured all he sought for when he was permitted to ask, "Is that road in easy call from that field?" To which the witness answered: "Yes, sir,

the road runs right by the field." Appellant was in nowise prejudiced by the rulings, even if the testimony should, as contended for, be classed among the exceptions to the rule excluding mere opinion of a witness.

The remaining exceptions relate to the charge to the jury as follows: (A) "Now, Mr. Foreman, when you come to the consideration of the evidence, what does that mean? What is the best legal yardstick to measure that evidence by? There is a presumption that attends every witness that goes upon the stand. Every witness that goes upon the stand is clothed with the presumption that he is telling the truth; not that every witness tells the truth, but he is clothed with that presumption; it is not infrequent that two witnesses go upon the stand and testify to two state of facts; it does not always mean that either is telling what is not so, but one may be more nervous than the other, and cannot tell his story in that straightforward way, although he is honest in what he says. It does not mean that it is always a falsehood where they do not agree; but where they disagree on the main salient features of a case on facts that everybody would have noticed if they were there. If you cannot reconcile their statements, it is for you to say who is telling the truth and who is not telling the truth, where they do not agree on the salient features of a case and their statements cannot be reconciled on the common ground of the common honesty of the witnesses. If you cannot reconcile their statements, you may say, I believe the statements of this or that witness, because you are the sole judges of the facts. I have nothing to do with the facts of the case; you are the sole judges of the facts in a case. Mr. Foreman, the law presumes that everybody is honest, not that everybody is dishonest; and when a witness takes that ⁴⁸⁷ stand, he is clothed with the presumption, and until the contrary appears, he is still clothed with that presumption. (B) Just like a man is presumed to be innocent until the state proves that he is guilty beyond a reasonable doubt. It does not mean that you must believe everything that a witness says, not at all—not any more than you are to consider that a prisoner is innocent, but he is presumed to be innocent until the state shows that he is guilty beyond a reasonable doubt. When that is done, the presumption is taken away and the defendant stands naked. (C) Those are presumptions, Mr. Foreman; there is no appeal from a question of fact. It is for you to say what witnesses are telling the truth and which

are not; it is for you to say what facts have been established, if any have been established, beyond a reasonable doubt. Now, Mr. Foreman, this is not a case that demands instructions on alibi, self-defense, or justification. The defendant does not have to prove his defense beyond a reasonable doubt, but by the preponderance of the evidence merely. (E) . . . (F) Now, Mr. Foreman, you are to inquire whether or not the state has made out its case here against the prisoner at the bar beyond a reasonable doubt. If the state has made out its case beyond a reasonable doubt, it will be your duty to say guilty. If the state has failed to make out its case beyond a reasonable doubt, it will equally be your duty to say not guilty (G).”

1. It is excepted that the above charge from A to B was erroneous, in that there is no presumption that a witness is telling the truth, and in that the charge invaded the province of the jury, whose duty it was to weigh the testimony without regard to any such presumption. This exception we think is well founded. There is a presumption that the character or reputation of a witness is good until it is impeached by testimony, but we are not aware of any law which authorizes a statement that there is a presumption that what such witness tells is the truth. The jury may infer from the unimpeached character of a witness that the witness intends to tell the truth; but whether what he ⁴⁸⁸ tells is, in fact, true, depends upon the conclusions of the jury, in view of the whole evidence before them, unaffected by any presumption as to whether it is true or not. Otherwise, the presumption of the defendant's innocence, which follows through the trial to the verdict, would be met by a counter-presumption of his guilt, the moment a state's witness narrated circumstances from which the jury might infer guilt. The rule announced by the circuit court would fill a case with warring presumptions as to facts. It is manifest that the charge was incorrect as matter of law, and was in effect instructing the jury as to the force and weight of testimony submitted to them. This error is further emphasized in the charge from B to C, in placing such alleged presumption on a level with the presumption in favor of defendant's innocence.

2. It is excepted that the charge from D to E is erroneous, in that in treating of the defense, he charged the jury that the defendant had to make out his defense by the preponderance of the testimony merely; wherein he should have charged the

jury, in addition thereto, that if they had a reasonable doubt upon the whole case, they should acquit the defendant. This exception assumes that the court correctly charged that the defendant had to make out his defense by the preponderance of the testimony, and only complains that he should have not only charged that, but instructed as to a reasonable doubt on the whole case. It would seem that both the circuit court and appellant conceived that defendant had set up an affirmative defense, whereas he did not. His defense was merely a plea of not guilty, a general denial. The fact that he admitted the connection with the prosecutrix, but claimed that he did so with her consent, constituted nothing more than a denial of the charge of rape, wherein, it was incumbent on the state to prove the fact that the act charged was without the consent of the prosecutrix. Therefore, it was not the duty of the defendant to make out his defense of not guilty by a preponderance of evidence, since it was incumbent on the state to prove ⁴⁸⁹ all the elements of the crime charged beyond a reasonable doubt, including, of course, the issue as to consent. As to the particular error assigned in this exception, we overrule the exception because the court fully instructed the jury to give the defendant the benefit of every reasonable doubt.

3. Error is assigned to the charge from F to G, in that the court thereby confined the jury to the consideration of the case as made out by the state, and in this, as well as in the charge as a whole, left the jury to consider only the case as made by the state, and excluded the defendant from the benefit of a reasonable doubt on the whole case. These questions are practically disposed of by what has already been said. It was a part of the state's case to prove that the prosecutrix did not consent, and that was the only real issue in the case. Therefore, when the jury were instructed to give the defendant the benefit of every reasonable doubt, the instructions went to the whole evidence on the subject. This exception is overruled.

Having reached the conclusion that there must be a new trial for error in the charge as pointed out in considering the first exceptions to the charge of the court to the jury, it becomes unnecessary to consider the appeal from the order of Judge Benet, refusing the motion for a new trial on after-discovered evidence.

The judgment of the circuit court is reversed and the case remanded for a new trial.

WITNESSES—PRESUMPTION AS TO CREDIBILITY OF.—A jury must not be instructed that it is a rule of law, a presumption that men testify truly and not falsely: See the extended note to *Dunn v. People*, 86 Am. Dec. 328. Compare *Jackson v. State*, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 30.

WITNESSES—IMPEACHING FOR WANT OF CHASTITY.—In prosecutions for rape, evidence that the reputation of the prosecutrix for chastity is bad is admissible; but such reputation must have been borne by her before the act, and not acquired afterward: See the extended note to *Smith v. Smith*, 80 Am. Dec. 368, on the impeachment of a prosecutrix for bad character. This question is further treated in the note to *State v. Sibley*, 53 Am. St. Rep. 479-482.

TURNIPSEED *v.* SIRRINE.

[57 SOUTH CAROLINA, 559.]

STATUTE OF FRAUDS—PERSONALTY.—A statute providing that no action shall be brought upon any contract for the sale of lands unless such contract, or a memorandum thereof, shall be in writing, has no application to contracts relating alone to personalty.

WILLS—PAROL AGREEMENT TO MAKE—STATUTE OF FRAUDS.—If two persons enter into an oral agreement to make mutual wills, and one of them, in execution thereof, bequeaths to the other, who subsequently dies without making a will, a legacy of ten thousand dollars and the residue of her estate, this is such part performance of the agreement on her part as takes the case out of the operation of the statute of frauds, permits the agreement to be proved by parol, and authorizes a decree against the heirs of the deceased, to the effect that the party who has made her will is the equitable owner, and entitled to be clothed with the legal title to all of the property which she would have received if the will of the other party to the agreement had been made.

G. Johnstone and Haynesworth & Parker, for the appellant.

Ansel, Cothran & Cothran, J. A. McCullough, C. F. Dill, and W. G. Sirriner, for the appellees.

⁵⁷⁴ **GARY, J.** In 1892, the plaintiff and her niece, Mrs. A. Viola Neblett, entered into an agreement to make mutual wills, leaving the bulk of the property of the one to the other. The plaintiff performed her part of the contract, but Mrs. Neblett died in 1897, making a disposition of her property by will different from that mentioned in the agreement. This is an action to enforce specific performance of said agreement. His honor, Judge Klugh, makes a detailed ⁵⁷⁵ statement of the facts in his decree dismissing the complaint.

The plaintiff appealed upon numerous exceptions, and the respondents gave notice of additional grounds, upon which they would ask that the decree be sustained. This court agrees with the circuit judge in his findings of fact and conclusions of law, except as to the fourth clause of section 4 and the fourth clause of section 17 of the statute of frauds. This disposes of all the exceptions except those relating to these clauses.

The fourth clause of section 4 (Rev. Stats., sec. 2151) is as follows: "No action shall be brought . . . upon any contract on sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." In his decree the circuit judge says: "By the allegations of the complaint and by the evidence, Mrs. Neblett's estate consists solely of personalty." The only one of the respondent's additional grounds relating to the kind of property Mrs. Neblett owned at her death is the seventh, which is as follows: "His honor erred in holding that it is uncertain from the evidence whether Mrs. Neblett owned any land at the time of her death, at which time alone the agreement speaks, it being respectfully submitted that the agreement speaks from the time it was entered into, at which time the evidence does show that Mrs. Neblett owned real estate." It well be seen at a glance that it was not the object of this additional ground to raise the question whether Mrs. Neblett owned any land at the time of her death, but to complain of error on the part of the circuit judge in ruling that the agreement spoke at the time of Mrs. Neblett's death, instead of at the time it was entered into. We will discuss the question with the fact established, that Mrs. Neblett did not own any real estate at the time of her death. The circuit judge ⁵⁷⁶ says: "The making of the wills, in pursuance of the agreement, was, in one sense, complete performance of the agreement on both sides; but in its proper sense, that act was but the first step toward the performance of an agreement which could not be complete till the death of one of the parties should render her will effective." Thus showing that the agreement, while binding between the parties, was not intended to have any effect upon the property of the respective parties until one of them died, and then upon the property of the one so dying.

From the time the agreement was entered into until one of the parties died, each had full control over her property. Neither was to have an interest in the property of the other until that time. As the agreement was not to have any effect upon the property other than that which the party first dying owned at the time of her death, and as Mrs. Neblett owned no real estate at the time, we fail to see how the clause under consideration has any application to the case.

The exceptions relating to the fourth clause of section 17 (Rev. Stats., p. 2152) is as follows: "No contract for the sale of any goods, wares, and merchandise, for the price of fifty dollars or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or giving something in earnest to bind the bargain, or in part payment, or so that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The case of *Fogle v. St. Michael's Church*, 48 S. C. 86, and the authorities therein cited, show that a party may enter into a valid agreement to dispose of his property by will, and specific performance will be decreed as in other proper cases. The question, then, is whether the plaintiff is precluded by the foregoing section from proving the agreement. The authorities relied upon by the respondents show (and the principle is well settled) that performance by one of the parties will take a case out of the statute, when noncompliance with the agreement by the other party would place him in such a position as to be a fraud ⁵⁷⁷ upon his rights, unless specific performance was decreed. They contend, however, that the plaintiff did not suffer any injury, and that she was in the same condition as to her property rights when Mrs. Neblett died as when the agreement was entered into. Let us see. When the agreement was entered into in 1892, the plaintiff was then far advanced in life, being more than sixty years of age, as she is now more than seventy years. The plaintiff, under the agreement, bequeathed to Mrs. Neblett a specific legacy of ten thousand dollars, to be paid before any other legacies, and after bequeathing certain other legacies, willed to her the residue of her estate. If the plaintiff had died before Mrs. Neblett, she would have received at least as much as ten thousand dollars from the plaintiff's estate. She, therefore, had the benefit of what might be termed the risk from 1892 until 1897. If Mrs. Neblett had taken out a policy

of insurance on her aunt's life for ten thousand dollars, it would have cost her a large sum of money if any company would have taken such a risk, as she was then very old and infirm. Yet Mrs. Neblett received the benefit, during that time, of what was equivalent to a policy for that amount or even more. It will not do to say that she received no benefit as the plaintiff did not die, any more than it would lie in the mouth of a man who paid his premium of insurance with a note to say there was a failure of consideration as he did not die or his property was not burned. It is impossible to make an exact calculation as to the extent to which Mrs. Neblett was benefited, because she not only was to receive the specific legacy of ten thousand dollars, but also the residue of the estate which was always uncertain, and of course the plaintiff did not at all times have the same amount of property on hand. As this benefit cannot be valued with exactness, and as it would be a fraud upon the rights of the plaintiff to allow Mrs. Neblett to receive it without accounting therefor, equity will decree specific performance.

The respondents rely upon the case of *Izard v. Middleton*, 1 Desaus. 116. This is a case in which there was an agreement to make mutual wills. In the report of the case we find the 578 following: "The chancellor then proceeded as follows: 'There are several points to be considered in this case: First, is it within the statute of frauds? If not, is there, secondly, sufficient parol proof of the agreement? Thirdly, has there been a performance of the agreement by either of the parties?' . . . The words of the statute which apply to this case are 'or upon any agreement which is not to be performed within the space of one year from the making thereof, unless in writing and signed, etc.'" This is the only clause of the statute that was considered, and it is only necessary to refer to the case of *Walker v. Wilmington etc. R. R. Co.*, 26 S. C. 88, and the authorities therein cited, to see that the chancellor's construction of the statute was erroneous. The court decided the second and third points against the complainant and dismissed his bill. There is nothing in the case just mentioned conflicting with our conclusion. But even if the performance by the plaintiff of her part of the contract did not take the case out of the statute, the retention of benefits by Mrs. Neblett would raise an implied agreement to make compensation for them, and resort might be had to the original agreement for the purpose of determining the kind of compen-

sation contemplated by the parties: *Carter v. Brown*, 3 S. C. 298. It is true this court cannot decree that a will shall be made; but, as was said in the case of *Fogle v. St. Michael's Church*, 48 S. C. 86, it can determine that the plaintiff is equitable owner, and entitled to be clothed with the legal title to all the property which she would have received if the will had been made, and it so adjudged.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for such further proceedings as may be necessary to carry into effect the views herein announced.

Upon filing of petition for rehearing on April 26, 1900, the remittitur was stayed until May 9, 1900, when the petition was refused in the following order:

PER CURIAM. After careful consideration of this petition, 579 we do not find that any material fact or principle of law has either been overlooked or disregarded; and hence there is no ground for a rehearing.

It is therefore ordered that the petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

WILLS, AGREEMENTS TO MAKE.—One may make a valid agreement to dispose of his property by will, and such agreement may be enforced after his decease against his heirs, devisees, or personal representatives: *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471. And a part performance of an agreement to make a particular disposition of property by will takes it out of the operation of the statute of frauds: *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, and monographic note. See, too, *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

JAMIESON v. WIGGIN.

[12 SOUTH DAKOTA, 16.]

JUDGES—ELIGIBILITY—“LEARNED IN THE LAW.”—
UNDER A CONSTITUTION which provides that no person shall be eligible to the office of judge of a county court unless he be “learned in the law,” a person has no right to hold such office unless he was, at the time of his election, either admitted, or entitled to be admitted, without examination, to practice as an attorney at law in the courts of the state having such a constitution.

C. B. Kennedy, for the appellant.

O. S. Gifford, for the respondent.

17 HANEY, J. Defendant’s right to hold the office of county judge is contested, on the sole ground that he is not “learned in the law” as required by the constitution. The referee before whom the cause was tried decided that the allegation of the plaintiff’s notice of contest that the defendant is ineligible to hold the office of county judge is not sustained by the proof, and judgment was rendered in favor of defendant.

The constitution provides that no person shall be eligible to the office of judge of the supreme, circuit, or county court unless he be “learned in the law”: Const., art. 5, secs. 10, 25.

18 Defendant, as a witness for plaintiff, testified: “I have resided in Lincoln county since 1871. My business has been farming and well drilling. I have never been admitted to practice in any court of record in this state or in the United States. Never attended any regular law school. Never studied any law books—only books of reference on the law

and the statutes of this state. Never read any text-books on law. Have read the statutes of this state and of Iowa, but don't think I have read any others. Held the office of probate judge in the territory one term. Have held numerous township offices, and read the statutes relating thereto. Have never studied the practice relating to circuit courts. Have never been admitted to the supreme court of this state, and have never been examined for admission to the bar." The phrase "learned in the law," will be found in several state constitutions. It is alliterative, euphonious, vague, and indefinite. A person who has never been admitted to the bar may be profoundly learned in the law, while one who has been admitted may be as profoundly ignorant of its principles. Between such a lawyer as Ambassador Choate and "Squire Tompkins of Tompkins Corners," there are as many degrees of learning in the law as there are members of the bar in the United States. Where, then shall the line be drawn in determining the qualifications of judges under this provision of the constitution? When and by whom shall the question be determined? It was certainly not contemplated that the educational qualifications of a candidate for supreme judge should be determined by a referee or jury in a contested election case, as might be the result were we to hold that his learning in the law is a question of fact, to be ascertained by an examination subsequent to his election. We think the phrase ¹⁹ must be construed as either requiring admission to the bar, or as a direction to the voters, their decision being conclusive. An extended research has discovered only one case in any degree analogous to the one at bar. The constitution of Texas requires that county judges "shall be well informed in the law of the state," and the supreme court of that state holds that the requirement was intended as a direction to the voters, and that a majority of the ballots settles the question: *Little v. State*, 75 Tex. 616. After quoting from the constitution that court observes: "Nevertheless, we are of opinion that it was never intended to fix a ground of qualification by terms so indefinite as the phrase, 'well informed in the law.'" While the language of our constitution is not identical, it is as vague and indefinite as that of the Texas constitution. In the Minnesota constitutional convention of 1857, Mr. Flandreau and Mr. Emmett, who were, we believe, subsequently judges of the supreme court of that state, expressed the opinion that the phrase, "learned in the law," would be construed to mean "that the candidate shall be

an attorney or counselor at law," and a motion to strike out the words was defeated: *Debates and Procedure of Minnesota Convention of 1857*, p. 513. The unpublished debates in our own constitutional conventions, on file with the secretary of state, disclose that the meaning of the words was not discussed, although a motion to strike them out was made and voted down.

There is considerable force in the contention that, if the framers of the constitution had intended to require admission to the bar as a qualification, they would have employed more apt language to express such intention. On the other hand, it may be argued that the effect of the view taken by the Texas court is to practically annul the clause in question. ²⁰ There being no satisfactory middle ground between these views, which one shall be adopted? There is a substantial difference between the constitution of Texas and the constitution of this state. In *Little v. State*, 75 Tex. 616, it is said: "It is apparent that county judges were not required to be lawyers, because that qualification is expressly provided by the constitution for judges of the higher courts." Here the same qualification is required of supreme, circuit, and county judges, and it could hardly have been contemplated that our court of last resort should be composed of persons who have not at least a prima facie title to the appellation of lawyer. The phrase was inserted for a purpose. It clearly indicates an intention to prescribe some sort of an educational qualification, and should be given some practical effect. Since the state was admitted, all political parties have acted upon the assumption that candidates for the office of supreme or circuit judge should be members of the bar. It would certainly surprise the legal profession and people generally to announce that any person not a lawyer might hold either of these offices. Under the constitution, there can be no distinction between supreme, circuit, or county judges with respect to this qualification; and we are constrained to hold that no one is eligible to either position who is not, when elected, either admitted, or entitled to be admitted, without examination, to practice as an attorney at law in this state. In other words, the fact that the candidate is learned in the law must have been ascertained by a competent tribunal prior to the election, the only and conclusive evidence of such fact being an admission to the bar by a court of this or some other jurisdiction authorized to license persons to practice as attorneys at law. When elected, the candidate must be

an attorney ²¹ at law. As it affirmatively appears from undisputed evidence that defendant was not "learned in the law," within the meaning of that term as herein defined, the judgment of the circuit court is reversed, and the cause remanded, with directions to enter judgment in favor of the appellant.

ELIGIBILITY TO OFFICE MEANS qualified to take office at the time when the official term begins, and does not require such qualification to exist at the time of the election to such office: *Kirkpatrick v. Brownfield*, 97 Ky. 558, 53 Am. St. Rep. 422.

FINCH v. PARK.

[12 SOUTH DAKOTA, 63.]

ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED can be maintained whenever one man has received, or obtained possession of, the money of another, which he ought, in equity and good conscience, to pay over.

AN ACTION FOR MONEY HAD AND RECEIVED can be maintained against persons who, with knowledge that property has been attached, cause the sheriff to sell it and pay the proceeds over to them, where they refuse to surrender such proceeds on demand, and where the attaching plaintiff has recovered judgment for his debt, and kept his attachment alive.

ELECTION—CHOICE OF REMEDIES.—If a plaintiff has a choice of remedies, he may elect.

George W. Case, for the appellants.

Charles S. Whiting, for the respondents.

⁶⁴ **HANEY, J.** Defendants appeal from an order overruling a demurrer to the complaint, the grounds of which are: 1. That there is a defect of parties defendant; and 2. That the complaint does not state facts sufficient to constitute a cause of action. It is alleged in the complaint that the plaintiffs are the surviving partners of the firm of Finch, Van Slyck, Young & Co.; that defendants are partners doing business under the firm name of Park & Grant; that John Armstrong was indebted to plaintiffs, who commenced actions against him to recover upon such indebtedness, and at the same time caused certain warrants of attachment to be issued, under which personal property belonging to Armstrong was attached and taken into the possession of the sheriff; that these attachments were discharged, but plaintiffs preserved their liens and ap-

pealed to this court, where the orders of the circuit court were reversed and the attachments sustained; that plaintiffs recovered judgments for costs in this court and judgments in the court below against the principal debtor; and that executions were issued upon such judgments, which were returned unsatisfied. It is further alleged "that on or about the seventh day of January, 1896, the defendant, as the firm of Park & Grant, caused and directed a large part of the goods and merchandise then held by the sheriff of Brookings county under the warrants of attachment hereinbefore mentioned to be sold, and also caused and directed a large sum of money to be collected upon the accounts levied upon under the above-mentioned warrants of attachment, all of which said goods and accounts were then held by the sheriff of Brookings county under and by virtue of said warrants of attachment hereinbefore mentioned, and the said firm of Park & Grant, defendants herein, did on or ⁶⁵ about the eleventh day of March, 1896, receive of the proceeds of said sale of said goods herein mentioned, and collection of accounts herein mentioned, the sum of fourteen hundred and thirty-three dollars and eighty-seven cents, of the moneys belonging to said firm of Finch, Van Slyck, Young & Co., under and by virtue of the lien of said warrants of attachment, and of the judgments obtained in the action herein mentioned, and the executions issued on said judgments, and said defendants were then and there well aware and fully advised of the fact that plaintiffs had levied their attachments on said property as hereinbefore mentioned, and that said attachments had been kept alive and in force by the said appeals to the supreme court; that thereafter, and prior to the commencement of this action, the said firm of Finch, Van Slyck, Young & Co. have demanded and caused to be demanded of said defendant firm that said defendant firm pay to said firm of Finch, Van Slyck, Young & Co. the said money received from the sale of such goods and collection of such accounts, and said defendant firm have refused, and do now refuse, to pay said sum, or any part thereof, but still retain the same from these plaintiffs, successors of said firm of Finch, Van Slyck, Young & Co., to their damage in the sum of fourteen hundred and thirty-three dollars and eighty-seven cents, together with interest thereon at seven per cent per annum from said eleventh day of March, 1896."

In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed,

with a view of substantial justice between the parties: Comp. Laws, sec. 4924. Thus construed, these material facts are confessed by the demurrer: Property held by the sheriff as security for plaintiffs' judgments was caused to be sold by the defendants, who received the proceeds of the sale with knowledge ⁶⁶ of plaintiffs' rights, and who, upon demand, refused to pay over the same. Here is money in the hands of one person, to which another is equitably entitled, and it may be recovered in an action upon the implied promise arising from the duty of the person in possession to pay it over to the person entitled thereto. No privity of contract between the parties is required, except that which results from the circumstances: *Siems v. Pierre Sav. Bank*, 7 S. Dak. 338. The reasons given by the Minnesota supreme court in deciding a case peculiarly analogous to the one at bar meet our approval. *Mitchell, J.*, speaking for that court, says: "An action for money had and received can be maintained whenever one man has received or obtained possession of the money of another, which he ought, in equity and good conscience, to pay over. This proposition is elementary. There need be no privity between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right conscientiously to retain. In such case the equitable principle upon which the action is founded implies the contract and the promise. When the fact is proved that he has the money, if he cannot show a legal and equitable ground for retaining it, the law creates the privity and the promise." And after stating the facts as alleged in the complaint in that case, from which it appears that the defendant, knowing the facts, induced and caused the sheriff to pay over to him proceeds of a sale, which should have been applied in satisfaction of plaintiffs' judgment, and refused, upon request, to pay plaintiffs the share to which they were entitled, the learned judge concludes as follows: "On sale, the proceeds of the property belong to those who own it, or those holding liens upon it before ⁶⁷ sale. Hence, if plaintiffs could establish by evidence the allegations of their complaint, they would be entitled to recover. Consequently, it was error in the court below to order judgment for defendants on the pleadings. It was immaterial that the sheriff paid the money to defendant in his wrong, and that plaintiffs may still have their remedy against him. Having a choice of remedies, the plaintiff may elect: *Legard v. Gholson*, 24 Miss. 691; *Allen v. Stenger*, 74 Ill. 119"; *Brand v. Williams*, 29 Minn. 238. The order appealed from is affirmed.

AN ACTION FOR MONEY HAD AND RECEIVED may, in general, be maintained whenever the defendant has money belonging to the plaintiff which, in equity and good conscience, he ought to refund to him: McDonald v. Metropolitan etc. Ins. Co., 68 N. H. 4, 73 Am. St. Rep. 548; Lanford v. Lee, 119 Ala. 248, 72 Am. St. Rep. 914. There need be no privity between the parties or any promise to pay other than that which results or is implied from one man's having another's money, which he has no right conscientiously to retain: Soderberg v. King County, 15 Wash. 194, 55 Am. St. Rep. 878; note to Wells v. Brigham, 52 Am. Dec. 755. The owner of personal property wrongfully converted into money or its equivalent may waive the tort and sue in assumpsit; but otherwise assumpsit cannot be maintained: Kidney v. Persons, 41 Vt. 386, 98 Am. Dec. 595.

HANSON COUNTY v. GRAY.

[12 SOUTH DAKOTA, 124.]

TAXES—ACTIONS FOR.—Unless expressly authorized by statute, no action can be maintained for the collection of taxes where there is a special and adequate method for their collection, as by distress and sale.

Action by the county to recover taxes.

P. A. Zollman, for the appellant.

Gamble & Dillon, for the respondent.

124 HANEY, J. This appeal is from an order sustaining a demurrer to the complaint. It appears upon the face of the complaint that the plaintiff is one of the organized counties of this state; that in 1888 certain personal property, then owned by defendant and situate within the plaintiff county, where defendant then resided, was duly assessed and certain taxes for territorial, county, and other purposes were duly levied thereon, which have not been paid; that before the taxes so levied became due, defendant disposed of and removed from the territory all of the personal property thus assessed; that he has since then been a nonresident of the territory and state; that when said taxes became due and delinquent the treasurer of said county was unable to collect same by distress and sale of personal property, by reason of his inability to find any such property of, or belonging to, the defendant in said county; that, **125** when such taxes became due and delinquent, defendant owned no real property to which the lien of such taxes could attach.

Since prior to the levy of these taxes, the statutes of this state have provided for the collection of taxes on personal property by distress and sale, and have not at any time, so far as we are aware, authorized the collection of such taxes by action: Comp. Laws, secs. 1609-1618. The special method thus provided is plain, speedy, and adequate. There may be decisions which announce a different doctrine, but the overwhelming weight of authority sustains the view that a tax is not a "debt," in the ordinary sense of that word; that, when the statute prescribes no special manner for its collection, it may be collected by an action at law, but, when an adequate method is provided by statute, an action for its collection cannot be maintained: *Gatling v. Commissioners*, 92 N. C. 536, 53 Am. Rep. 432; *Board of Commrs. v. First Nat. Bank*, 48 Kan. 561; *Montezuma Valley Water Supply Co. v. Bell*, 20 Colo. 175; *Camden v. Allen*, 26 N. J. L. 398; *Detroit v. Jepp*, 52 Mich. 458; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *Richards v. Commissioners*, 40 Neb. 45, 42 Am. St. Rep. 650; *Louisville Water Co. v. Commonwealth*, 89 Ky. 244; *State v. Piazza*, 66 Miss. 426.

Appellant cites the following cases in support of its contention that the special statutory method is not exclusive: *McLean v. Myers*, 134 N. Y. 480; *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *Davenport v. Chicago etc. Ry. Co.*, 38 Iowa, 633; *Dubuque v. Illinois Cent. Ry. Co.*, 39 Iowa, 56; *Burlington v. Burlington etc. R. R. Co.*, 41 Iowa, 134; *Dollar Sav. Bank v. United States*, 19 Wall. 227. *McLean v. Myers*, 134 N. Y. 480, does not sustain the contention, because the 126 New York statute under discussion in that case, as shown by the opinion, expressly provides that the tax "may be recovered, with interest and costs, by the receiver of taxes of said city in an action in any court of record in this state": *McLean v. Myers*, 134 N. Y. 484. *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521, is not in point. In that case the court construed and considered the constitutionality of a statute expressly authorizing the collection of taxes by action. Undoubtedly, the legislature has power to authorize the collection of taxes by action, in addition to any special method, but it has not exercised such power in this state. In *Davenport v. Chicago etc. Ry. Co.*, 38 Iowa, 633, the question was not properly before the court, and it expressly refrained from intimating any opinion thereon. Careful examination of the other Iowa cases cited show that only two of the four judges then constituting the

court concurred in the view that a tax is a debt for which an action at law may be maintained, although the statute provides a special remedy. It will be observed that Judge Cole dissented, and Judge Miller held that the question was not properly before the court. Whatever may be found in *Dollar Sav. Bank v. United States*, 19 Wall. 240, tending to support appellant's contention is simply dicta, because the subject is dismissed with these words: "But all this is superfluous, for the act of Congress authorizes suits at law to recover unpaid taxes. It enacts as follows: 'Taxes may be sued for and recovered in the name of the United States, in any proper form of action before any circuit or district court of the United States, for the district in which the liability for such taxes may have been, or may be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action.'"

Numerous other cases cited in digests and by text-writers, ¹²⁷ as holding that an action will lie to recover taxes without express statutory authority, notwithstanding an adequate special method of collection has been provided, have been examined, but not one has been found where the question is directly decided in favor of that view. The conclusion relative to the collection of taxes by an action at law, herein announced, was reached by a majority of this court in *Brule Co. v. King*, 11 S. Dak. 294. But as one of the judges, without stating any reasons, dissented in that case, it was deemed not improper to again consider the question, which has been done with care and the assistance of able counsel. It should be added that the judge who dissented in *Brule Co. v. King*, 11 S. Dak. 294, did so on the ground that the question now decided was not involved therein, and without forming any opinion in relation thereto. The order of the court below is affirmed.

TAXES—COLLECTION OF, BY ACTION.—A common-law action for the recovery of a tax as a debt will not lie: *Richards v. Commissioners*, 40 Neb. 45, 42 Am. St. Rep. 650. This case holds that a method prescribed by statute of enforcing and collecting taxes is exclusive, but the weight of authority is that such method is cumulative only, and does not take away the right of action on the legal obligation to pay a claim created by law: See the monographic note to *Richards v. Commissioners*, 42 Am. St. Rep. 658, on the recovery of a personal judgment for taxes.

NATIONAL BANK OF COMMERCE v. FEENEY.

[12 SOUTH DAKOTA, 156.]

NEGOTIABLE INSTRUMENTS—STATEMENT ON MARGIN.—THE PRESUMPTION is, that a statement upon the margin of a note that it is to be discounted at a certain per cent if paid before maturity was written upon the face of the instrument contemporaneously with its execution, and as a constituent part thereof. It must, therefore, be given effect as such.

NEGOTIABLE INSTRUMENTS—UNCERTAINTY AS TO AMOUNT RENDERS NOTE NON-NEGOTIABLE.—A promissory note is non-negotiable unless the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment.

NEGOTIABLE INSTRUMENTS — DISCOUNT — UNCERTAINTY AS TO AMOUNT—NON-NEGOTIABILITY.—A promissory note having a statement written upon its face that it is to be discounted at a certain per cent if paid before maturity is non-negotiable, for, at the time of its execution, it is impossible to ascertain what amount will be required to pay it, without considering the discount, depending upon a condition uncertain of fulfillment.

NEGOTIABLE INSTRUMENTS—WHEN NON-NEGOTIABLE NOTE IS SUBJECT TO EQUITIES—SETOFF.—If sheep, purchased on a warranty, are paid for by a non-negotiable note, the maker of which is sued thereon by a bona fide purchaser thereof before maturity, the defendant is entitled to set off damages caused by a breach of the warranty not to exceed the amount of the note.

Wilson L. Shunk and John F. Hughes, for the appellant.

John A. Holmes, for the respondent.

157 HANEY, J. This is an action to recover possession of personal property for the purpose of foreclosing a mortgage thereon. A verdict was directed for plaintiff, and defendant appealed. When the appeal was first considered, the judgment of the court below was modified and affirmed: *National Bank v. Feeney*, 9 S. Dak. 550. Upon rehearing, a majority of the court adhered to the former decision: *National Bank v. Feeney*, 11 S. Dak. 109. A second rehearing was granted, and the issues involved have been again carefully considered.

The conclusions previously announced relative to the authority of the sheriff to make a second seizure under the claim and delivery process, those relative to the rulings of the court upon defendant's motion for judgment upon his counterclaim and plaintiff's motion to strike out the counterclaim, and those relative to the knowledge of plaintiff's cashier not being the ¹⁵⁸ knowledge of the bank, are adhered to, and will not be further discussed.

Defendant admits the execution of the notes and mortgage given to secure the same, as alleged in the complaint, but alleges that the only consideration therefor was a sale by the original payee of the notes of defendant of two hundred sheep mentioned and described in the mortgage; that prior to the purchase defendant had not seen or examined the sheep; that the original payee, for the purpose of inducing defendant to purchase, made certain representations and warranted the quality of the sheep; that defendant purchased relying upon such warranty and representations; that there was a breach of the warranty, and other facts showing damage in excess of the amount due upon the notes. It was shown that plaintiff purchased the notes for value, before maturity, and when they were introduced in evidence defendant objected on the ground that the same were incompetent, irrelevant, and immaterial, and no foundation laid. The objection was overruled, and defendant excepted. Defendant being on the stand as a witness on his own behalf these proceedings were had:

“Attorney for Defendant.—State the contract of sale as made there and as witnessed by you. (Objected to by plaintiff as incompetent, irrelevant, and immaterial, and no defense to this action as the action now stands, which objection being sustained, an exception was taken and such ruling is assigned as error.)

“Attorney for Defendant.—If the court please, I will state for record that the object of this question is to show a contract embracing a warranty of the sheep for which these notes were given, and the same that are described in the chattel mortgage. We will follow this with testimony showing damages resulting from a breach of such warranty, ¹⁵⁹ and we claim the right to do this under the note which has been introduced in evidence, and on the ground that such note is a non-negotiable instrument; also on the further ground that the testimony in this case shows that Mr. Ewert, who was a member of the firm of Clough, Ledwick & Co., and acted as agent for said firm, was also the cashier of the bank, the plaintiff in this action, and that knowledge to him was knowledge to the party. We ask at this time to amend our answer setting out the note as the same is introduced in evidence.

“The Court.—It is unnecessary, because the bill of exceptions will contain the note.

“Attorney for Defendant.—At this time, then, we offer to prove a warranty of the property sold in this case, a breach of

that warranty, resulting in damages to an amount greater than the amount due on the notes.

"Attorney for Plaintiff.—I object on the same ground as stated to the question before.

"The Court.—I believe this note is a negotiable instrument, and, the evidence being that it is in the hands of an innocent purchaser before maturity, the equities are cut off, and therefore the offer of testimony is denied."

The notes are identical, except as to amount and date of maturity. The following is a copy of one of them:

EXHIBIT C.	
<p style="text-align: center;">This note to be discounted at 12 per cent. if paid before maturity.</p>	
<p style="text-align: right;">\$343.35</p> <p>On or before the 21st day of June, 1893, I promise to pay Clough, Ledwick & Company, or order three hundred forty-three and 35-100 dollars, at the National Bank of Commerce of Pierre, South Dakota, value received, with interest at the rate of twelve per cent. per annum from maturity until paid. Should suit be commenced on this note, a reasonable amount shall be allowed for attorney's fees. The drawers and endorsers of this note severally waive presentment and notice of protest, and guarantee its payment at any time after maturity.</p>	<p style="text-align: center;">Pierre, South Dakota, Sept. 21st, 1892.</p> <p style="text-align: center;">Michael Feeney,</p>
<p>Due _____, P. O. Address _____, No. _____.</p>	<p style="text-align: center;">} _____ _____</p>

¹⁰⁰ In absence of evidence to the contrary, it will be presumed that the words relating to discount were written upon the face of each note contemporaneously with the execution of the instrument as a constituent part thereof, and they must be given effect as such: Daniel on Negotiable Instruments, secs. 149, 150, 154. The only difference between the allegations of the complaint concerning the terms of the notes and the in-

struments introduced in evidence by plaintiff consists in the words relating to discount. It ¹⁶¹ is therefore evident that defendant's proposed amendment was for the purpose of making the pleadings conform to the proof with respect to this discount clause. There was no other respect in which the notes differed from the admitted allegations of the complaint. Then the attention of the trial court must have been called to the variance between the pleadings and proof. It might have been better practice for defendant to have insisted upon a ruling upon his application to amend, but we think neither the plaintiff nor trial judge can complain if we treat the case as if the application had been allowed as it should have been. The rights of the parties were determined in the court below upon the facts as established by the evidence, and should be so determined in this court. The question, then, arises whether a note having the condition as to discount if paid before maturity, contained in these notes, is negotiable. The effect of uncertainty as to the amount to be paid and terms of payment upon the negotiability of a promissory note was considered by this court in *Hegeler v. Comstock*, 1 S. Dak. 138, and again in *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859. While a different result is reached, the latter case expressly follows and adopts the principles announced in the earlier decision, the court making use of this language: "While, in the opinion of the writer, a promissory note, otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by ¹⁶² any conditions not certain of fulfillment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same." Applying the test thus established to the notes in this case, the conclusion cannot be avoided that they are non-negotiable. When executed, it was impossible to ascertain what amount would be required to pay them, without considering the discount, depending upon a condition uncertain of fulfillment. The circuit court erred in ruling that they were negotiable. The notes being non-negotiable, defendant is clearly entitled to set off against the amount due thereon any damages he may have sustained by reason of a breach of war-

ranty on the part of the original payee, but if such damages exceed the sum due upon the notes, of course, he cannot recover the excess of this plaintiff. The judgment is reversed, and a new trial ordered.

NEGOTIABLE INSTRUMENTS—WHAT DESTROYS NEGOTIABILITY—DISCOUNT.—ANYTHING WRITTEN OR PRINTED on a negotiable instrument prior to its issuance by the maker relating to the subject matter thereof, and tending to restrain or qualify it, is regarded as part of the contract; and if, by such language, payment is not necessarily to be made at all events, and for the full sum, at a time certain, subject to no contingency, its negotiability is destroyed: *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52, 23 Am. St. Rep. 166. Thus, a promissory note containing a provision that it may be paid at any time before maturity, and that interest shall be deducted till due, is not negotiable. Such stipulation renders the contract uncertain and contingent, both as to the time of payment and the amount to be paid, and is inconsistent with the essential character of a negotiable promissory note: See note to *Hubbard v. Mosely*, 71 Am. Dec. 699.

NON-NEGOTIABLE NOTE—ACTION ON—BREACH OF WARRANTY AS A DEFENSE.—A breach of warranty is a defense to a note given for the purchase price of property sold under a warranty: *Note to Gale etc. Mfg. Co. v. Stark*, 23 Am. St. Rep. 742. A transferee of a non-negotiable note is bound to inquire of the maker whether any defenses exist against it, and, failing to do so, he stands exactly in the shoes of the person from whom he receives it. If that person could not recover, the transferee cannot: *James v. Benson*, 155 Pa. St. 489, 35 Am. St. Rep. 899. Compare *McCormick etc. Machine Co. v. Taylor*, 5 N. Dak. 53, 57 Am. St. Rep. 538, and note.

FIRST NATIONAL BANK OF RAPID CITY *v.* MCGUIRE.

[12 SOUTH DAKOTA, 226.]

JUDGMENT-ROLL—WHAT PAPERS CONSTITUTE.—Under a statute making "all orders or papers in any way involving the merits and necessarily affecting the judgment" a part of the judgment-roll, a petition to have a cause set down for trial before some other judge, for the reason that the presiding judge is indirectly interested, and may be prejudiced or biased, the order denying the application, and the exception taken thereto, are parts of the judgment-roll.

JUDGES—DISQUALIFICATION OF—INDIRECT INTEREST.—A judge is indirectly interested in an action where his wife is interested therein, and such interest absolutely disqualifies him from sitting in the case. Hence, the fact that she is a stockholder in a corporation disqualifies him from trying a cause in which it is a party plaintiff.

JUDGES—WAIVER OF DISQUALIFICATION—WHAT IS NOT.—A party does not waive his right to object to a judge's taking jurisdiction of a cause and proceeding with its trial by applying to

him for an injunctional order relating to the same subject matter, where the judge is disqualified, because the acts of a disqualified judge are without jurisdiction.

Action by the bank against McGuire to foreclose a pledge.

Charles W. Brown and James Boyd, for the appellant.

Fowler & Whitfield, for the respondent.

228 CORSON, P. J. This was an action for the foreclosure of pledged collateral given by the defendant to secure the payment of two certain promissory notes, one for five thousand dollars and the other for fifteen hundred dollars, payable to the order of the plaintiff. The complaint is in the usual form. To this complaint defendant filed an answer admitting certain allegations in the complaint, denying certain others, and interposing a counterclaim. Before the trial of the case the defendant presented the following petition and application: "To the above-entitled court: The petition of Michael McGuire, the above-named defendant, respectfully shows that he is informed and believes, and therefore alleges, that the wife of the Hon. William Gardner, the presiding judge of this court, is the owner of fifty shares of the capital stock of the plaintiff corporation, and is also a director thereof, the total stock of the said corporation being five hundred shares, each of the par value of one hundred dollars, and that your petitioner fears that the said judge might for that reason be unconsciously prejudiced or biased in the consideration of said cause. Wherefore your petitioner respectfully prays that the said judge will not proceed further herein, but will cause the said action to be placed upon the special calendar, and be set down for trial before some other circuit judge of the said state." On the hearing of this petition the court made the **229** following order: "And upon said hearing it appearing to the satisfaction of the court that defendant has submitted to the jurisdiction of the court by applying for and obtaining an injunctional order regarding the same subject matter, . . . and the court having heard the arguments of counsel for and against said petition, and being fully advised in the premises, . . . it is ordered that said petition be, and the same is, in all things denied. . . . To which ruling and decision the defendant at the time duly excepted, and said exception is by the court allowed and settled." The cause was tried by the court, and it made findings of fact and entered judgment in favor of

the plaintiff, and from this judgment and an order denying a new trial the defendant has appealed to this court.

No bill of exceptions has been settled in the action. The respondents therefore make the point in this case that, there being no bill of exceptions, the petition and order of the circuit court are not properly before this court for review. Respondents are correct in their contention, unless the petition and order are properly part of the judgment-roll. We are inclined to the opinion that they do constitute a part of such roll. Section 5013 of the Compiled Laws, defining what shall constitute the judgment-roll, reads as follows: "Unless the party or his attorney shall furnish the judgment-roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment-roll: . . . 2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment." It will be noticed that "all orders or papers in any ²³⁰ way involving the merits and necessarily affecting the judgment" constitute a part of the judgment-roll. In the case at bar it is contended by the appellant that the petition and order not only affected the merits of the case, but affected the jurisdiction of the court to such an extent that after the filing of such petition, assuming the facts therein stated to be true, it could not lawfully proceed further with the trial of the said cause. We think this is correct, and the petition and order necessarily affected the judgment, and properly constituted a part of the judgment-roll. Our conclusion, therefore, is that this petition, order, and exception taken thereto are properly before us.

Assuming that the statement made in the petition, that the wife of the trial judge owned fifty shares of the capital stock of the plaintiff bank at the time the case came before the lower court for trial, is true, the question is fairly presented, Was the trial judge qualified to proceed with the trial of the said cause? It is well-settled law that a judge who is interested in an action is disqualified to try or determine the same. So firmly is this established that Cooley, in his work on Constitutional Limitations, lays it down as a rule that it is not competent for the legislature, even, without the aid of some constitutional provision to permit a judge who is interested to sit at the trial of the cause: Cooley's Constitutional Limitations, 5th ed., 403-

410; Washington Ins. Co. v. Price, 1 Hopk. Ch. 1; Adams v. Minor, 121 Cal. 372; Williams v. City Nat. Bank (Tex. Civ. App., June 20, 1894), 27 S. W. Rep. 147; Austin v. Nalle, 85 Tex. 520; Templeton v. Giddings (Tex., Dec. 6, 1889), 12 S. W. Rep. 851; Gregory v. Cleveland etc. R. R. Co., 4 Ohio St. 675; Peninsular Ry. Co. v. Howard, 20 Mich. 18; Stockwell v. Township Board, 22 Mich. 341; Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114; Clark v. Lamb, 2 ²³¹ Allen, 396; Pearce v. Atwood, 13 Mass. 324; State v. Young, 31 Fla. 594, 34 Am. St. Rep. 41; North etc. Min. Co. v. Keyser, 58 Cal. 315; Freeman on Judgments, sec. 146. In Washington Ins. Co. v. Price, 1 Hopk. Ch. 1, the court says: "It is a maxim of every code, in every country, that no man should be judge of his own cause. The learned wisdom of enlightened nations and the unlettered ideas of ruder societies are in full accordance upon this point; and, wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. The reasons which render this principle just and necessary are obvious; and whatever may be the exceptions to the general infirmities of human nature, this rule has no exception in its terms or its policy, and it should accordingly be universal and inflexible in its operation. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own cause is always a tacit exception to the authority of his office: Finch on Common Law, 19; 4 Coke, 118; Wingate's Maxims, 170. Such, I conceive, is also the law in this state. Though the principle that a party can never act as judge is not declared by our constitution or statute, yet, as it is a maxim of universal justice, and is undoubted law in England, it exists here, as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and, when his own rights are in question, he has no authority to determine the cause."

Neither the constitution nor the statutes of this state have prescribed what shall constitute a disqualification of a supreme or circuit judge, other than that provided in article 5, section 31, of ²³² the constitution, which reads as follows: "No judge of the supreme court or circuit court shall act as attorney or counselor at law, nor shall any county judge act as attorney or counselor at law in any case which is or may be brought into his court, or which may be appealed therefrom." Neither counsel

has cited any case bearing directly upon the question before us, and this court, in its researches, has not been able to find one. The question must, therefore, be treated as one of first impression. The wife of the judge of the circuit court, being the owner of one-tenth of the capital stock of the said bank, was, though not a party named in the record, directly interested in the result of the action, and it would seem to be an anomaly for her husband to sit as judge in a case where she was so directly interested. While it is true that the husband, in this state, is not directly interested in the property of his wife during her lifetime, and that she may encumber or dispose of it without his consent, yet he is by law entitled to succeed to a portion of his wife's estate upon her decease, and will be, in law, presumptively an heir to her estate: Comp. Laws, sec. 3401. The husband is therefore indirectly, if not directly, interested in the property of his wife. And it is certain that no suitor in an action would feel entire confidence that he could obtain justice, in which the wife of the judge presiding was interested adversely to him. If a judge, therefore, would not be qualified to sit, as being an interested party, it would seem that the same reason should disqualify him from sitting in a case where his wife is interested as a party. There may be cases in which the trial judge would not be influenced in the slightest by the fact that his wife was interested in the action, but, as stated in the petition in this case, such judge might be unconsciously²³³ prejudiced or biased in the consideration of said cause; and it is to avert this danger, and to preserve the purity of the courts and the confidence of the community in their fairness and integrity, that the judge so situated should be held disqualified. It is the safer rule to hold that the fact that the judge's wife is interested in the action absolutely disqualifies him from sitting in the case. We think it, therefore, our duty to apply the same rule to this case that we would have applied had the judge himself been the owner of the fifty shares of stock instead of his wife.

The contention is made on the part of the respondent that the appellant waived his right to object to the judge taking jurisdiction of and trying the cause by applying to the said court for an injunctive order relating to the same subject matter. It is doubtful if the proceeding referred to is before this court on this appeal. It is true the learned circuit court in making the order refers to the fact that such an application had been made to the court, and seems to base its order deny-

ing the petition on that ground. But, assuming that the appellant did find it necessary to apply to the circuit court or judge for an injunctive order, to prevent some irreparable injury to himself, it cannot be said that he thereby conferred jurisdiction upon the court to try the merits of the cause now before us. If the view we take of the case, that the judge of the circuit court was indirectly interested, and was, therefore, disqualified from sitting in the case, is correct, then it follows that the judgment entered in the case was entered without jurisdiction on the part of the court. Judge Cooley states the rule thus: "Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will ²³⁴ avail in the appellate court, and the suit may be dismissed on that ground. The judge acting in such case is not simply acting irregularly, but he is acting without jurisdiction": Cooley's Constitutional Limitations, 5th ed., 510; Freeman on Judgments, sec. 146. We are of the opinion, therefore, that the learned circuit court was in error in holding that the fact that appellant had applied for an injunctive order regarding the same subject matter constituted a waiver of his right to object to the judge proceeding with the trial of the said cause.

Without, therefore, imputing to the learned circuit judge, in the slightest, any improper motive for proceeding with the trial of the said cause, or believing for a moment that the fact that his wife was interested could or did influence his decision in the case, still we must hold that he was absolutely disqualified from sitting in the case, and that the judgment entered therein must be reversed. The judgment of the circuit court is reversed.

A JUDGE IS DISQUALIFIED from sitting in a case in the result of which he is interested: *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Meyer v. San Diego*, 121 Cal. 102, 66 Am. St. Rep. 22.

PARRISH v. MAHANY.

[12 SOUTH DAKOTA, 278.]

PURCHASER FOR VALUE—PRESUMPTION.—If the same property is conveyed by the same grantor to two different persons, at different times, and, after both deeds are recorded, a person takes a mortgage from the grantee in the deed last executed, but first recorded, such mortgagee must, in an action to foreclose the mortgage, and in order to establish it as against the first grantee, assume the burden of proving that the mortgagor was a bona fide purchaser for value without notice of the prior conveyance. This fact will not be presumed.

APPEAL—THEORY NOT ADVANCED BELOW.—Cases will not be reversed on appeal upon a theory not advanced and relied upon in the lower court.

APPEAL—WHAT CANNOT FIRST BE RAISED ON.—A contention not made in the court below cannot be considered on appeal.

Action to foreclose a mortgage, which is shown, in *Parrish v. Mahany*, 10 S. Dak. 276, 66 Am. St. Rep. 715, to have been executed on April 15, and recorded on April 19, 1887. There was a judgment for the defendants, and the plaintiffs appealed.

Gamble & Dillon, for the appellants.

Bartlett Tripp and Robert B. Tripp, for the respondents.

281 HANEY, J. This is an action to foreclose a real estate mortgage executed by the defendants Mahany and wife. Respondent Wright claims the property under a conveyance executed and recorded prior to the execution and recording of plaintiff's mortgage. The issues are stated in our former decision, *Parrish v. Mahany*, 10 S. Dak. 276, 66 Am. St. Rep. 715, wherein it is held that respondent Wright's deed must be regarded as having been recorded when it was first deposited with the register of deeds, notwithstanding it was subsequently withdrawn from the register's office, without respondent's authority or consent, before it was actually spread upon the records. Adhering to this conclusion, it will be observed that when plaintiffs' mortgage was executed the records disclosed a warranty deed from Cunningham (the common source of title) to respondent Wright, executed August 14, 1885, recorded April 14, 1887, and a warranty deed from Cunningham to Mahany, executed April 2, and recorded April 11, 1887. Plaintiffs were encumbrancers in good **282** faith, for value, without actual notice of respondent Wright's prior conveyance, and without ac-

tual notice that her deed was recorded when their mortgage was taken.

Having decided that respondent's deed shall be deemed to have been recorded when plaintiffs parted with the consideration of their mortgage, this court concluded that if Mahany, their mortgagor, purchased "in good faith, and for a valuable consideration, he was the owner of the land, and the lien of plaintiffs' mortgage is superior to the claims of the respondent; if he did not so purchase the property, he had no title whatever, and respondent's rights are paramount to those of the mortgagees"; and that, in the absence of any findings as to whether Mahany purchased in good faith and for value, it would be presumed that he did so purchase the premises. Upon this presumption the judgment of the trial court was reversed: *Parrish v. Mahany*, 10 S. Dak. 276, 66 Am. St. Rep. 715. Subsequently, a rehearing was granted for the purpose of again considering whether or not such presumption should prevail in the determination of this appeal. In the court below and upon the original argument in this court plaintiffs relied upon the contention that they were encumbrancers in good faith, for value, and that their mortgage was first recorded; hence attention was not given to the question now under discussion, and it did not receive the consideration its importance merited, in our former decision. As to whether or not a subsequent purchaser under a deed is presumed to be a bona fide purchaser for value, without notice, the authorities are conflicting: See note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288; *Sillyman v. King*, 36 Iowa, 207; *Colton v. Seavey*, 22 Cal. 496; *Prickett v. Muck*, 74 Wis. 199; *Bank of San Luis Obispo v. Fox*, 119 Cal. 61. Were this a contest ²⁸³ between Mahany and the respondent Wright, there would be reasons for holding that he should be presumed to have purchased in good faith, for value, and without notice, which cannot be invoked in favor of the plaintiffs. When the conveyance to Mahany was executed, the record title was in Cunningham, respondent's deed not then having been recorded. When plaintiff's mortgage was taken, respondent's conveyance was of record. Plaintiffs had record notice that Mahany's title was in doubt, and, as was stated in our former decision, "the record of respondent's deed was sufficient to put the mortgagees upon inquiry as to whether Mahany was a purchaser in good faith and for a valuable consideration. After the recording of her deed, the mortgagees parted with the consideration of their

mortgage at their peril": Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715. Undoubtedly, plaintiffs' mortgage would not have been executed if respondent's deed had appeared upon the records, as it should have done; but, as shown in our former decision, respondent was not responsible for the unfortunate mistake which was the real cause of the controversy between these parties. Where the records disclose the existence of a prior conveyance, prudent persons will hesitate to purchase of the subsequent grantee, although his conveyance may have been first recorded, because they have record notice that their grantor's title is in doubt. Therefore, without deciding what presumption should prevail where the subsequent grantee or subsequent encumbrancer acquires his rights before a prior conveyance has been recorded, we think that where, as in this case, an encumbrancer's rights are acquired after the prior conveyance has been recorded, such encumbrancer should assume the burden of proving that his grantor, the grantee in ²⁸⁴ the subsequent conveyance, was a bona fide purchaser for value, without notice of the prior conveyance. It follows that this court must recede from the position taken in our former opinion, wherein it announced that because it was not determined by the findings whether or not Mahany purchased in good faith, and for a valuable consideration, it would presume that he did so purchase the premises.

There is another respect in which this court erred in connection with this question of presumption. It inadvertently reversed the trial court upon a proposition not presented to that court and not presented to this court by the argument of counsel. It is evident that plaintiffs relied, in the court below and in this court, in their first argument, upon the theory that their mortgage was recorded prior to the recording of the respondent's deed, and this court has frequently announced the well-established rule of appellate procedure that causes will not be reversed upon a theory not advanced and relied upon in the lower court: Noyes v. Brace, 9 S. Dak. 603; Advance Thresher Co. v. Schmidt, 9 S. Dak. 489.

Respondent attacks the conveyance from Cunningham to Mahany in one division of her answer, and prays for its cancellation. For this reason plaintiffs contend that, whatever the general rule may be, the burden was assumed by, and rested upon, respondent in this action to show that Mahany was not a purchaser in good faith and for a valuable consideration. This contention was not made in the court below, and therefore

should not be considered upon this appeal. And it is not tenable. Mahany was not served and did not appear. Consequently, the issues relating to the cancellation of his conveyance were not adjudicated, and were not material to the controversy ²⁸⁵ between plaintiffs and respondent. It is highly probable that, in the light derived from the reargument of this appeal, counsel for both parties would frame different pleadings were the cause to be again tried, but this court must determine the questions involved as they are presented by the record before it, and upon such record, we think the circuit court did not err in concluding that the plaintiffs acquired no interest in, or lien upon, the mortgaged premises, and its judgment is affirmed.

BURDEN OF SHOWING THAT SUBSEQUENT PURCHASER WAS A BONA FIDE PURCHASER.—If each party claims under separate deeds from the same grantor, and the plaintiff's deed though earlier in date, was not recorded until after the defendant's deed had been placed on record, it is incumbent upon the plaintiff, if he would postpone the defendant's deed to his own, to show, by a preponderance of evidence, that the defendant had actual notice of the prior deed when he received his: See the monographic note to *Anthony v. Wheeler*, 17 Am. St. Rep. 289, on the presumption that a subsequent purchaser is a purchaser bona fide. Compare *Morse v. Curtis*, 140 Mass. 112, 54 Am. Rep. 456; *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144.

APPEAL.—QUESTIONS NOT RAISED IN THE TRIAL COURT cannot be considered for the first time on appeal: *Williamson v. Eastern Bldg. etc. Assn.*, 54 S. C. 582, 71 Am. St. Rep. 822; *Reich v. Cochran*, 151 N. Y. 122, 56 Am. St. Rep. 607.

STRIEGEL v. HARDING.

[12 SOUTH DAKOTA, 342.]

CLOUD ON TITLE—MISTAKE IN DESCRIPTION—SURPLUSAGE.—If premises are described in a mortgage as lot 22, in block 5, according to R.'s map of the city, and known as the H. & H. lot, situated on M. street, but are described in the complaint and subsequent proceedings to foreclose the mortgage as lot 21, in block 5, according to S.'s map of the city, the same being designated as lot 21, in block 17, on R.'s map, and known as the H. & H. lot, situated on M. street, a court will, in an action to quiet title to the property acquired under the foreclosure proceedings, and as against a defendant who appeared and answered therein, treat the description, "lot 21," as surplusage, and disregard it entirely, where it is affirmatively stated in the complaint that there was no such lot as "21," in either block 5 or block 17, because the descriptions in the

complaint and other proceedings were sufficient to identify the property as that described in the mortgage, and neither the defendant nor any other person could have been misled by the mistake in the number of the lot.

Granville G. Bennett and McLaughlin & McLaughlin, for the appellant.

Charles E. Davis, for the respondent.

344 CORSON, J. This is an action by the plaintiff to quiet his title to a certain lot situated in the city of Deadwood. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and, the demurrer being sustained, plaintiff has appealed to this court.

The facts contained in the complaint may be briefly stated as follows: On the twenty-fourth day of July, 1893, the defendant and one Joseph King executed to one Charles Pfunder a promissory note, and also a real estate mortgage in which the property mortgaged is described as follows: "Lot No. twenty-two (22) in block No. five (5), according to the official map of the city of Deadwood compiled by Peter L. Rodgers, the said premises being known as the 'Hildebrand and Harding lot,' situated on the westerly side of Lower Main street, in the city of Deadwood, Lawrence county, South Dakota." It was further alleged that an action was commenced in August, 1895, for the foreclosure of said mortgage, in which action said Pfunder was plaintiff and the said Harding and King were defendants. That subsequently, by order of the court, one Spencer V. Noble was substituted as plaintiff, and such proceedings were had therein that in April, 1897, judgment and decree were duly entered in said action for the foreclosure of said mortgage. **345** Pursuant to said decree and special execution issued thereunder the real estate and premises described in said mortgage were duly sold by the sheriff of said county for the amount due plaintiff in said action, with costs and expenses of said sale. The certificate of sale was duly assigned to the plaintiff herein, and on the twenty-third day of January, 1898, a deed was duly executed by the sheriff of Lawrence county to the plaintiff. That said Harding and King served answers to the supplemental complaint filed in said foreclosure suit by said Spencer V. Noble. "In the pleadings and proceedings in said action, to wit, in the complaint, decree, notice of sale, sheriff's certificate of sale, and sheriff's deed, the mort-

gaged premises were described as follows, to wit: 'Lot No. twenty-one (21), in block No. five (5), according to the map of said city of Deadwood prepared by W. S. Smith, and same being designated as "lot No. twenty-one (21), in block No. seventeen (17)," on official map of the city of Deadwood prepared by Peter L. Rodgers; said premises being known as the "Hildebrand and Harding lot," situated on Lower Main street, in said city of Deadwood, Lawrence county, state of South Dakota.' That by inadvertence a mistake was made in the description of said mortgaged premises, in this, to wit: Said lot is described as lot No. twenty-one (21), when it is in truth and in fact lot No. twenty-two (22), according to said maps and plats of said city. That in block No. 5, Smith's map, the same being block No. 17, Rodgers' map, there is no lot No. 21. That on Lower Main street there is no other block No. 5 on Smith's map, nor No. 17 on Rodgers' map. That the description in said instruments, to wit, 'Hildebrand and Harding lot,' is a description by which said mortgaged premises is ³⁴⁶ generally and well known, and especially to said defendant, John A. Harding, he being the same person whose name is used in connection with that of Hildebrand, and who was for many years owner of said lot, and who, in the mortgage executed by him to said Pfunder, described it as the 'Hildebrand and Harding lot.' It is further alleged that said Harding was not, and could not have been, misled, or in any manner prejudiced, by the mistake made in the number of said lot in said papers, pleadings, and proceedings in said foreclosure suit; that plaintiff is now the owner and in possession of said mortgaged premises under and by virtue of said foreclosure proceedings, decree, and sheriff's sale thereunder, and that the description therein is amply sufficient to identify said premises, but that said error in the description casts a cloud upon his title; that said defendant claims some right to or interest in said premises adverse to this plaintiff, but that said claim is wholly unfounded. "Wherefore plaintiff prays that by the judgment and decree of this court said defendant be adjudged to have no right, title, interest, or estate, either legal or equitable, in and to said premises, and that plaintiff's title thereto be quieted, and that defendant be enjoined from ever asserting any right, title, or claim therein or thereto, together with his costs in this behalf expended; and for such other and further relief as to the court may seem equitable and just."

It will be noticed that the description of the lot contained in the mortgage is "lot twenty-two (22), in block five (5), according to the official map of the city of Deadwood, compiled by Peter L. Rodgers." It will be further observed that in the proceedings on foreclosure, including complaint, decree, certificate of sale, and deed, the property is described as "lot No. twenty-one ³⁴⁷ (21), in block five (5), according to the map of said city of Deadwood, prepared by W. S. Smith, and same being designated as 'lot twenty-one (21), in block 17,' on the official map of the city of Deadwood, prepared by Peter L. Rodgers." It will be also observed that it is alleged in the complaint that in block No. 5, Smith's map, the same being block No. 17, Rodgers' map, there is no lot 21; that on Lower Main street there is no other block No. 5 on Smith's map nor block No. 17 on Rodgers' map; that the description in said instruments, to wit, "Hildebrand and Harding lot," is a description by which said mortgaged premises are generally and well known; and that said John A. Harding was for many years the owner of said lot, and the person who executed the mortgage to said Pfunder, and described it as the "Hildebrand and Harding lot." Assuming, as we must, that the allegations of the complaint are true for the purposes of this demurrer, it is quite clear that said Harding could not have been misled by the mistake made in the proceedings to foreclose the mortgage, and, having been a party to that proceeding, and having appeared and answered therein, he is estopped from claiming any title to the property by reason of the mistake made in the description in said foreclosure proceedings. The property having been sold under the foreclosure proceedings, and the deed executed to the purchasers upon such sale, and no redemption made by the said Harding from such sale within the time prescribed by law, this claim to the property, made subsequent to such sale and expiration of the time of redemption, is clearly without right, and defendant should be restrained as prayed in the complaint.

It is contended on the part of respondent that the only remedy that plaintiff has in this case is to have the sale and deed thereunder ³⁴⁸ set aside, the decree amended, and a resale of the property under the decree as amended; but it will be noticed that by the complaint in this action the mistake alluded to in the description had its origin in the complaint in said foreclosure action, and not in the decree, as contended by counsel for respondent. It is true, counsel for respondent has filed an amended abstract, in which he gives the description of

the property as found in the amended and supplemental complaint in the foreclosure action, and from this amended abstract it would seem that the premises were described in the amended complaint substantially as described in the mortgage. But this amended abstract cannot be considered on this appeal, as this court can only consider the complaint in the present action to which the demurrer has been interposed. Under the complaint, therefore, in this action, the remedy suggested by respondent's counsel would not be available to the plaintiff.

The real question presented is, Is there sufficient in the description given in the complaint and subsequent proceedings to identify the property, notwithstanding the alleged mistake in the number of the lot? It will be noticed that the property is described in the complaint and subsequent proceedings as "in block five (5), Smith's map, the same being block No. seventeen (17), Rodgers' map, . . . on Lower Main street, in the city of Deadwood," and as being known as the "Hildebrand and Harding lot." There being no lot 21 in block 5 of Smith's map, and no lot 21 in block 17 of Rodgers' map, the description, so far as the number of the lot is given, must be disregarded. We then have left the description of a lot "in block No. five (5), Smith's map, the same being block No. seventeen (17), Rodgers' map, . . . on Lower Main street," ³⁴⁹ generally known as the "Hildebrand and Harding lot." This lot is in fact lot No. 22 in block 5, Smith's map, block 17, Rodgers' map. As we have before stated, therefore, Harding could not have possibly been misled by this mistake in the description, and hence his claim to the same since the foreclosure proceedings must necessarily be without right, and the plaintiff is clearly entitled to the relief demanded in the complaint. Possibly, if there had been such a lot as No. 21 in either block 5, Smith's map, or block 17, Rodgers' map, which had at any time been known as the "Hildebrand and Harding lot," it might be claimed that the defendant, Harding, or other parties might have been misled by the mistake in the description. But, it being affirmatively stated that there was no such lot as 21 in either block 5 or block 17, neither the defendant, Harding, nor any other person could have been misled by the mistake in the number of the lot. We are of the opinion, therefore, that under the allegations in the complaint it would be the duty of the court to treat the description "lot No. twenty-one (21)" as surplusage, and disregard it entirely, and to hold that the other descriptions in the complaint and other proceedings

were sufficient to identify the property as being the same described in the mortgage: *McWhirter v. Allen*, 1 Tex. Civ. App. 649; *Bray v. Adams*, 114 Mo. 486. These conclusions necessarily lead to a reversal of the order of the circuit court, and the same is reversed.

SUFFICIENCY OF DESCRIPTION.—It is sufficient if a description enables one to identify the premises conveyed: *Note to Parker v. Salmons*, 65 Am. St. Rep. 297.

ST. LAWRENCE v. GROSS.

[12 SOUTH DAKOTA, 350.]

MUNICIPAL CORPORATION—RIGHT TO REMOVE BUILDINGS FROM.—An injunction will not issue, at the instance of taxpayers of a town, to restrain the owner of a building therein from removing it therefrom, though the burden of taxes on the other residents will be thereby increased.

Wilmarth & Simmons, for the appellants.

S. V. Ghrist, for the respondent.

351 CORSON, J. This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The action was brought to obtain an injunction to restrain the removal by defendant of a certain brick building from the town of St. Lawrence. The facts, as alleged in the complaint, may be briefly stated as follows: That the town of St. Lawrence is a municipal corporation, and within the corporate limits there are twelve hundred acres of land, of which not over two hundred and forty acres are platted; that the defendant is the owner of a certain two-story brick building situated in the town of St. Lawrence, and is now making preparations to remove the same to the town of Miller; that said building has a basement eight feet in depth, excavated from the line of the sidewalk fourteen feet into the street under the sidewalk, and that, if said building is removed, it will leave a deep and dangerous excavation and pitfall, endangering the safety of the traveling public; that said building was constructed in 1889 at a cost of \$5,000; that the assessed value of all the real property within the corporate limits of the town of St. Lawrence for the year 1887 was \$46,297, and the value of the personal property was \$63.-

268; in 1899 the assessed value of the real property within the corporate limits of said town was \$19,267, and of the personal property, \$6,706; that during the year 1889 eight buildings, of the value of \$9,000, were destroyed in said town by fire, and subsequently an elevator and a mill, of the value of \$20,000, were so destroyed; that since 1886 fifty-two buildings have been removed from said town, which were of the value of \$25,000, and no other buildings have been built to replace them; that during the year 1886 said town issued bonds in the sum of ³⁵² \$4,400 for the purpose of constructing waterworks, and in 1894, together with the township of St. Lawrence, issued \$11,000 in bonds for the purpose of constructing artesian wells, under the irrigation act of 1891, and there is now outstanding and unpaid \$3,400 in town warrants, upon which a large amount of interest has accrued; and in 1885 school bonds to the amount of \$3,000 were issued; that to pay the interest upon said bonds it is necessary to levy and collect an annual tax of \$700; that the plaintiffs Taylor, King, and Davey are residents and taxpayers of the town of St. Lawrence, and are owners of real property therein. Plaintiffs further allege that if defendant's building is removed, the taxes which must necessarily be paid by the taxpayers of said town will be much increased, and that by the removal of defendant's building the taxes of the plaintiffs and other taxpayers similarly situated will become burdensome, intolerably excessive, and amount practically to a confiscation of their property; that said town of St. Lawrence, if this and other buildings in contemplation of removal are removed, will be unable to levy and collect sufficient taxes to meet the running expenses of said town, its proportionate share of the school expenses, and meet the principal and interest of its bonded indebtedness, and, if said buildings are allowed to be removed, it will seriously impair the ability of the town to pay the principal and interest of its bonded indebtedness; that the plaintiffs have no adequate and speedy remedy at law; and that the facts herein stated were known to the defendant at the time he purchased the building herein described. Wherefore plaintiffs pray for an order enjoining the defendant from removing such building until such time as the bonded and warranted indebtedness of the town shall be entirely paid.

³⁵³ One of the grounds upon which plaintiffs' complaint seems to be based is that the removal of the building by the defendant will create a nuisance by leaving a dangerous, unfilled

excavation under the sidewalk and a part of the street. So far as the complaint is based upon that theory, it is sufficient to say that there is no allegation in the complaint that he threatens or intends to leave his premises in a dangerous condition. It is to be presumed, therefore, that upon the removal of the building he will cause the basement to be made secure and safe for the public.

Appellants further contend that the removal of this building from the town of St. Lawrence will so far diminish the taxable property in said town as to render it difficult for the town to meet its current expenses and the principal and interest of its indebtedness, and it will largely increase the burden of taxes of the remaining residents of said town and township, and that the taxpayers in said town have such an interest in retaining the taxable property within the same as to enable them to maintain this action. The appellants do not claim that the indebtedness of a municipal corporation, either bonded or floating, creates a lien upon the property of individuals within the municipality, but do claim that the property of the respondent within the town of St. Lawrence, as soon as the bonds were issued, became subject to and was liable for its proportionate share of all bonds issued by the town, and that said property was purchased by the defendant with the fraudulent intent of removing the same from the town of St. Lawrence for the purpose of avoiding payment of the taxes that might be assessed thereon. The learned counsel for the appellants have not referred the court to any adjudicated cases sustaining their ³⁵⁴ position, and the court, in its own researches, has not been able to find any.

Counsel for appellants have also failed to point out under what head of equity jurisprudence their complaint can be sustained. It is true courts of equity will protect property of one against unlawful invasion by another where irreparable injury may result from such invasion, but those courts do not undertake to relieve parties in all cases who may suffer from the acts of another. It is only when a party has done some wrongful act which injures another that courts of equity will grant to such injured party relief. The law seems to be well established that the owner of real property not encumbered by any liens may dispose of such property in any manner that he may deem proper, and that he has an undoubted right to sell or remove any building constituting a part of the realty, using care that in removing said building he does no injury to the person or

property of another; and hence, in removing his building from the town of St. Lawrence, defendant will do no wrongful act of which the town or taxpayers have a right to complain: In *re Utica etc. R. R. Co.*, 56 Barb. 456-460. It is certainly a novel claim that parties having no interest in or lien upon the property of the defendant have the right to restrain him from removing his building to a locality where he may desire to rebuild the same. It may be unfortunate for the plaintiff taxpayers that by the removal of this building their taxes may be increased, but it is one of those incidents in the ownership of property for which neither courts of law nor courts of equity afford a remedy. It is quite clear, therefore, that the municipality of the town of St. Lawrence and the taxpayers therein cannot maintain this action. Neither the town of St. Lawrence ³⁵⁵ nor the taxpayers have any right to insist that parties who were the absolute owners of property in such town when the indebtedness of said town was incurred shall continue as owners of such property, or that purchasers of the same shall continue to keep it in the same condition it was when the indebtedness was incurred. We fail, therefore, to discover any law, legal or equitable, upon which this action could be maintained.

It is contended by appellants that this case comes within the principle by which proceedings of municipal corporations at the suit of citizen taxpayers, where such proceedings encroach upon private rights, are restrained. But courts of equity exercise their jurisdiction in such cases on the ground that the municipality is charged with, and made the depository of, a public trust, and that by the performance of the threatened acts they are violating such trust: *High on Injunctions*, sec. 1236. The owner of property within a municipality sustains no such relation to the municipality or the taxpayers therein. We are of the opinion, therefore, that the court was clearly right in sustaining the demurrer. The order of the circuit court is therefore affirmed.

INJUNCTIONS ISSUE to protect those rights only which are clear, or at least free from reasonable doubt: *Snowden v. Noah*, 1 Hopk. Ch. 347, 14 Am. Dec. 547. An injunction will not issue where the right of the complainant is doubtful: *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883. There must be a case of probable right to justify the issuance of an injunction: *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747.

IN RE TOD.

[12 SOUTH DAKOTA, 386.]

EXTRADITION—HABEAS CORPUS—QUESTIONS OPEN TO INQUIRY.—When a prisoner, held under an extradition warrant, applies for a writ of habeas corpus in the state upon which demand is made, the court or judge authorized to issue the writ is not conclusively bound by the action of the executive in issuing his extradition warrant. He may, therefore, upon the hearing of the writ, inquire as to whether or not an offense was charged, whether or not the relator was a fugitive from justice, and whether or not the governor's warrant was, in fact, issued by him.

EXTRADITION—CHARGE OF CRIME—NECESSITY OF. The affidavit, indictment, or information upon which it is sought to hold a party in a proceeding for extradition must charge a public offense, and, upon habeas corpus, this is a question of law for the court or judge to determine.

EXTRADITION—FUGITIVE FROM JUSTICE—REQUIREMENT.—In extradition proceedings, it must appear that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand, and this fact should be recited in the extradition warrant.

EXTRADITION—FUGITIVE FROM JUSTICE—EVIDENCE. The question as to whether or not a person demanded as a fugitive from justice is such is one of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory, but the prima facie case made by the issuance of his warrant, that the person is a fugitive from justice, may, on habeas corpus, be overthrown by proof to the contrary.

EXTRADITION—FUGITIVE FROM JUSTICE—WHO IS NOT.—A person charged with false pretenses in a transaction with a mining company in another state is not a fugitive from the justice of that state, where he came to this state, but afterward returned to such other state, where a final settlement was had with the company, and again came to this state, each trip having been made upon the company's request.

EXTRADITION.—THE DUTY OF EXAMINING REQUISITION PAPERS, passing upon their validity, and of issuing a warrant, devolves upon the governor personally, and he cannot delegate it to any other person.

C. E. Davis, for the appellant.

John L. Pyle, attorney general, for the respondent.

388 CORSON, J. On July 21, 1899, Grant Heatley Tod presented a petition to the honorable judge of the circuit court of the eighth judicial circuit, in and for the county of Lawrence, setting forth that since the sixteenth day of September, 1898, he had been a resident of said Lawrence county; that he was then unlawfully restrained of his liberty by the sheriff of Lawrence county, who claimed some right to detain him; and that

such detention was unlawful, and praying that he (said petitioner) might be forthwith discharged from custody. Thereupon the said circuit judge issued a writ of habeas corpus, commanding the said sheriff of Lawrence county to produce before him the body of said Tod, together with the cause of his detention. The sheriff made return that he detained the petitioner under and by virtue of an extradition warrant purporting to be issued by the executive of this state; also, a warrant of arrest purporting to be issued by the said executive of this state, directed to the sheriff, coroner, or any other peace officer of Lawrence or any other county of this state; a requisition purporting to be issued by the executive of the state of Nebraska; and a warrant purporting to be issued by the county judge of York county, state of Nebraska. To this return the petitioner interposed a demurrer, which was overruled. Thereupon the petitioner filed an answer, in which he denied that he was a fugitive from justice from the state of Nebraska, and alleged "that at the time of leaving the state of Nebraska, on the seventeenth day of September, 1898, your petitioner acted through the requests of the officers and agents of the York Mining and Development Company, Limited; that on or about the fifteenth day of May, 1899, at the request of the York Mining and Development Company, your petitioner visited the city of York, Nebraska, and while there ³⁸⁹ all accounts and business was fully and finally settled and approved by the said company; that thereafter your petitioner was specially requested to return to the state of South Dakota, as the employé of the said company, and thereupon the said company purchased and delivered to this petitioner transportation to go from the city of York, Nebraska, to the city of Deadwood, and it was in pursuance of the business of the said company, and not as a fugitive from justice from the state of Nebraska, that your petitioner has returned to the state of your petitioner's residence." The petitioner further alleged, "upon information and belief, that the warrant set forth in the return of the respondent, W. I. Lancaster, the agent of the state of Nebraska, to receive and transport your petitioner to the state of Nebraska, and the warrant in said return directing the sheriff of Lawrence county, South Dakota, to arrest your petitioner, were not executed by his excellency, Andrew E. Lee, governor of the state of South Dakota; that on the eighteenth day of July, 1899, at the time said warrants purport to be signed, the said Andrew E. Lee was at the town of Vermillion, in South Dakota, and never

saw the said warrants, or either of them, nor did he upon that day see the agent of the state of Nebraska, W. I. Lancaster, or read the requisition of the executive of the state of Nebraska, requiring the surrender of your petitioner as a fugitive from justice, but that each of the said warrants have been theretofore signed by the governor of the state of South Dakota in blank, and were filled out by other persons than the said governor of the state of South Dakota, and that the said papers were never read or seen by the executive after the said blanks were filled out, and before the same were delivered to W. I. Lancaster, agent of the state of Nebraska; and for the ³⁹⁰ reasons aforesaid the said warrants, and each of them, were at the time of the delivery thereof, and at all times have been, and now are, illegal and void." The answer also contained a copy of the affidavit or complaint alleged to have been made before the county judge of York county, in the state of Nebraska, upon which the requisition of the governor of the state of Nebraska was based. The circuit judge, at the close of the hearing, made an order remanding the petitioner to the custody of the said sheriff. A motion was made to the circuit court to vacate and set aside said order, and to grant the petitioner a new trial, which was denied; and from the order denying the same the petitioner has appealed to this court.

The counsel for the petitioner and appellant contends: 1. That the affidavit or complaint upon which the requisition issued by the governor of the state of Nebraska was based does not charge an offense; 2. That there was no evidence before the governor of this state or before the court tending to show that he was a fugitive from justice; 3. That the extradition warrant purporting to be issued by the governor of this state, as well as the warrant for his arrest, never in fact having been issued by the executive of this state personally, is null and void; and 4. If there was any proof before the executive of this state tending to show that the appellant was a fugitive from justice, that evidence was clearly overcome by the proof of the appellant on the hearing that he was not a fugitive, and that he was not a subject for extradition under the law of Congress. The grounds for holding the appellant and remanding him to the custody of the sheriff of Lawrence county were not stated by the judge in his order, and hence what those grounds were are matter of conjecture. The learned circuit judge evidently ³⁹¹ overlooked the requirement of section 7843 of the Compiled

Laws (habeas corpus act), which provides: "It shall be the duty of the court or judge remanding him to make out and deliver to the sheriff or other person to whose custody he shall be remanded an order in writing stating the cause or causes of remanding him."

The attorney general takes the position in this court that it was not competent for the circuit judge to proceed further in the examination of the case upon the writ of habeas corpus than to determine whether or not the extradition warrant purporting to have been issued by the executive of this state was sufficient in form, and stated the facts required to be stated in such a warrant to authorize the appellant to be held and taken to the state of Nebraska, and that it was not competent for the court to enter into an investigation as to whether or not an offense was charged, or whether or not the appellant was a fugitive from justice, or whether or not the warrant purporting to be issued by the governor was in fact issued by him. Upon the questions presented the decisions of the courts have not been in entire harmony, but we are of opinion that the weight of authority is in favor of the doctrine that all of these questions may be investigated by the court or judge authorized to issue the writ of habeas corpus, and that it is his duty to investigate them, when properly presented, and that he is not conclusively bound by the action of the executive in issuing his extradition warrant. The law of Congress providing for the extradition of fugitives from justice provides as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person ³⁹² has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All the costs or expenses incurred in the appre-

hending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory": U. S. Rev. Stats., sec. 5278. Under the provisions of this section the party sought to be extradited must be charged with the commission of a crime, and be a fugitive from justice, to authorize the executive of the state upon whom the demand is made to issue his warrant. In *Roberts v. Reilly*, 116 U. S. 80, the supreme court of the United States says: "It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it: 1. That the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the governor of the state making the demand; and 2. That the person demanded is a fugitive from the justice of the state, the executive ³⁹³ authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof": *Ex parte Reggel*, 114 U. S. 642; 12 Am. & Eng. Ency. of Law, 2d ed., 601; 8 Ency. of Pl. & Pr. 823. It must also be affirmatively shown that he is a fugitive from justice, and such fact should be recited in the extradition warrant. In the warrant issued in this case the only recital upon this subject is that the "said Grant H. Tod, alleged to be within the jurisdiction of this state, is a fugitive from the justice of the state of Nebraska." Undoubtedly, the warrant of the governor would be prima facie sufficient to prove that all the necessary prerequisites of the statute have been complied with prior to its issue by him, but this prima facie case may be overcome by competent evidence on the part of the person sought to be held upon

the habeas corpus proceeding. Upon this question, the supreme court, in *Roberts v. Reilly*, 116 U. S. 80, says: "To be a ³⁹⁴fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

The affidavit in this case or the so-called complaint, made against the appellant in the state of Nebraska, is apparently insufficient to warrant the holding of the appellant, and his extradition to the state of Nebraska. The affidavit or complaint is exceedingly lengthy, and no useful purpose would be subserved by reproducing it in this opinion. The authorities are quite harmonious in holding that the affidavit, indictment, or information upon which the party is sought to be held must charge a public offense; and, as we have seen, this is a question of law for the judge or court to determine upon the habeas corpus proceeding. In this case the complaint or affidavit is entitled as follows: "In the District Court of York County, Nebraska. State of Nebraska, Plaintiff, v. Grant H. Tod, Defendant. Complaint. State of Nebraska, York County.—ss." And it proceeds: "This complaint of H. C. Page, made before me, M. M. Wildman, county judge of said county, who, being first duly sworn, deposes and says that Grant H. Tod, on or about the fifteenth day of September, 1898, in the county of York, state of Nebraska, intending unlawfully to cheat and defraud the York Mining and Development Company, Limited, did then ³⁹⁵and there falsely, knowingly, designedly, and unlawfully pretend," etc. The affidavit or complaint then proceeded to set out certain pretenses by which the company was induced to enter into a contract with him in regard to certain mining operations in South Dakota and concludes as follows: "Subscribed and sworn to before M. M. Wildman, county judge. Filed July 14, 1899. M. M. Wildman, county judge." It was also shown on the hearing that by the laws of the state of Nebraska the county court and the district court are different courts of record, and a judge of one of said courts does not exercise the functions of a judge of the other, or interchange-

ably. It was further shown that informations in that state must be prosecuted by the prosecuting attorney. It will thus be seen that the proceeding is a very irregular one, and apparently not authorized by the laws of the state of Nebraska. But in addition to this irregularity, which would probably vitiate the whole proceeding, the so-called complaint itself would seem to be insufficient, in that it states no public offense. But, in the view we take of the case, it is not necessary to discuss this question at this time.

On the hearing of the habeas corpus proceeding it was clearly shown by the appellant that he came to this state at the request of the said mining company, and in May, 1899, he returned to Nebraska at their request, and had a final settlement with the company, and again returned to this state, upon the special request of the said company. Certainly, under these circumstances the appellant could not be regarded as a fugitive from justice. Leaving that state, and coming to this state upon the request of the party alleged to have been defrauded, remaining here a number of months in its employ, returning ³⁹⁶ to that state for the purpose of a settlement, and again coming back to this state, not only with the knowledge, but at the special request, of the said company, negatives the alleged fact that he is a fugitive from justice. While it may not be necessary, to make a person a fugitive from justice, that he should leave the state where the offense is alleged to have been committed with the intention or for the purpose of avoiding a prosecution, still we think it must appear that he left the state without the knowledge or consent, actual or implied, of the parties alleged to have been defrauded. Liberal as the rule laid down by the supreme court of the United States is in holding parties to be fugitives from justice, the appellant would not come within that rule.

It was also shown on the hearing that the warrant purporting to be signed by the executive of this state was never in fact issued by him, but was issued by some person other than the governor. The duty of examining requisition papers, passing upon their validity, and issuing his warrant, devolves upon the governor personally. It is a power that cannot be delegated to any other person. The liberty of the citizen is involved, and he can only be restrained of that liberty by the personal act of the governor, upon whom the power has been conferred by the constitution and laws of the United States, and the constitution and the laws of this state. The execution of the power

requires careful examination of the requisition papers, and involves the exercise of a sound judgment, aided, in case of necessity, by the advice of the attorney general of the state. The liberty of the citizen would be in great danger if any person could be allowed to issue such extradition warrants in the absence of the governor.

³⁹⁷ We are clearly of the opinion that the circuit judge erred in remanding the appellant to the custody of the sheriff of Lawrence county, and that the circuit court erred in not vacating and setting aside the order made by the circuit judge. The order of the circuit court is reversed, and that court is directed to enter an order discharging the appellant from custody.

EXTRADITION—HABEAS CORPUS—QUESTIONS OPEN TO INQUIRY—CHARGE OF CRIME.—The only subjects of inquiry in extradition cases, are the sufficiency of the papers and the identity of the prisoner: Note to *In re Van Sciever*, 47 Am. St. Rep. 737. There must be a charge of crime, but the question whether or not the offender is charged with the commission of a crime against the laws of the demanding state is one of law, and is always open, on the face of the papers, in a habeas corpus proceeding, to judicial inquiry: *Barranger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113; *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341. That the court may examine into the executive warrant to see whether a crime has been properly charged, see the monographic note to *Matter of Fetter*, 57 Am. Dec. 398, treating of interstate extradition.

KETTLESCHLAGER v. FERRICK.

[12 SOUTH DAKOTA, 455.]

HOMESTEAD—FRAUDULENT TRANSFER OF.—A conveyance by a husband to his wife of premises occupied by them as a homestead, made without consideration, and for the purpose of defeating existing and subsequent creditors in case the family should remove therefrom, and, with other funds, purchase and occupy a different homestead, is fraudulent as to creditors, where such contrivance has been carried out.

Action by Kettleschlagel against Ferrick. The defendants obtained a judgment and the plaintiff appealed.

E. H. Wilson and H. H. Keith, for the appellant.

P. W. Scanlan, for the respondent.

⁴⁵⁶ FULLER, P. J. This action by a judgment creditor to set aside, as fraudulent, a deed absolute in form, executed on the twenty-seventh day of July, 1887, by the defendant Mike Ferrick to his wife, the defendant Bridget Ferrick, resulted in a judgment dismissing the complaint, with costs, and plaintiff appeals. The facts essential to a determination of the law governing the case are undisputed, and these: When this deed was executed, and continuously thereafter, until the year 1894, respondents occupied the premises described therein as their homestead. No consideration was ever paid for the deed, and the conveyance was made pursuant to a secret agreement between respondents ⁴⁵⁷ that the legal title should be vested in his wife for the sole purpose of perpetually delaying and preventing the creditors of said Mike from subjecting said premises to the satisfaction of their claims. On the day this deed was executed, a suit was pending and being tried against him, and his avowed purpose at the time was to place the title in the name of his wife, "so that, in the event judgment went against him in that suit, or any other judgment should be recovered against him, it would not appear against the title of this land, and, in case he should move away, that they could not sell the land under such judgment." Upon the theory that the conveyance, notwithstanding the intention of the parties, resulted in no injury to creditors, because the quarter section of land described therein was at the time impressed with the character of a homestead, the court gave respondents judgment, although it was shown that the same was abandoned as a homestead, and another homestead acquired, which was being thus occupied by respondents when this suit was commenced. The exact point to be determined is whether the homestead may be transferred by the husband to the wife, confessedly without consideration, and for the purpose of withholding such property from existing and subsequent creditors, in case they should remove therefrom, and with other funds purchase and occupy a different homestead. It appears from the record that Mike Ferrick has no property subject to execution, and that appellant, on the twenty-ninth day of November, 1897, obtained his judgment against both respondents, in an action for damages sustained by reason of their negligence in setting out a prairie fire, by which a large quantity of his hay was destroyed. Contrary to the view of the trial court, conditions may possibly arise which render a ⁴⁵⁸ deed to the homestead fraudulent and void as to creditors, although their rights be postponed until

the debtor and his family have no further occasion to occupy such premises, and have, in accordance with the intent that prompted the transfer, removed therefrom to a homestead subsequently acquired, and into the purchase of which nothing of value from the original homestead has entered. It would be a plain perversion of the homestead law to hold that the husband may convey the legal title of the homestead to his wife, without consideration, for the purpose of enabling him to withhold the same from creditors, should the family thereafter remove to a new home, purchased with other funds, and itinerancy would be the pernicious result of such a doctrine, instead of the establishment of a permanent home. It has been noticed that the fraudulent intent to have the wife hold the land for the benefit of her husband, after they had abandoned its occupation as a homestead, was fully carried out. If the premises were thereby placed beyond the reach of creditors, nothing can prevent the perpetration of future frauds of similar character, whenever they may so desire, resulting in the acquisition of numerous farms, while the real owner thereof remains execution proof. The following cases, in perfect harmony with reason, equity, and public policy, hold that a homestead conveyed by a husband to his wife, not really to pass title, but to defraud creditors, will not be protected from them as her property, after their homestead immunity has ceased: *Rives v. Stephens* (Tex. Civ. App., Oct. 17, 1894), 28 S. W. Rep. 707; *Cox v. Shropshire*, 25 Tex. 113; *Baines v. Baker*, 60 Tex. 139; *Taylor v. Ferguson*, 87 Tex. 1. As pertinent to the principle here involved, we cite *Currier v. Sutherland*, 54 N. H. 475, 20 Am. Rep. 143.

459 Although the real estate in question was a homestead when the deed was executed, the design and effect of the conveyance was to actually prejudice creditors, because they might, but for the transfer, subject the premises to the payment of their claims, whenever the same were abandoned, and another homestead acquired. As a general proposition, a conveyance without consideration, from the husband to the wife, cannot stand, if the creditors are injured thereby: *Woods v. Allen*, 109 Iowa, 484. True it is, as a general rule, that creditors are not injured by the conveyance of the homestead without consideration; but when the transfer is such that the property has not ceased to belong to the grantor, and the homestead right thereto has been abandoned both by the grantor and grantee,

and another homestead acquired by them independently of the former, the statutory exemption right, thus fraudulently impressed with a secret trust, ceases to exist as to the premises first occupied, and a creditor made such by the wrongful act of the parties to such deed has the right to interfere. For the comfort and protection of the debtor and his family the homestead right was created, but not as an instrument by which to defraud either existing or future creditors. Our conclusion, therefore, is that the premises still remain the property of the respondent, Mike Ferrick, and that the deed, which is colorable only, and made pursuant to a secret agreement that his wife should hold the property beyond the reach of creditors, in case they should remove therefrom, should be set aside, as the mere contrivance of a dishonest debtor. The judgment appealed from is reversed, and the case remanded for future proceedings according to law.

Haney, J., dissents.

HOMESTEAD—TRANSFER OF, BY HUSBAND, WHETHER FRAUDULENT.—A conveyance of a homestead by a husband to his wife cannot be a fraud upon his creditors, because it is not liable to their demand: *Wells v. Anderson*, 97 Iowa, 201, 59 Am. St. Rep. 409; note to *Edwards v. Reid*, 42 Am. St. Rep. 613; *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579; *Freeman on Executions*, 3d ed., sec. 239; and one homestead may be exchanged for another free from any claim of creditors upon either: *Winter v. Ritchie*, 57 Kan. 212, 57 Am. St. Rep. 331, and note showing that a judgment debtor may sell his homestead and invest the proceeds in another, and carry the exemption of the first homestead into the one subsequently acquired, even as against debts created before the acquisition of the latter. But a person cannot lawfully hold two homesteads at the same time: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440.

LOTHROP v. MARBLE.

[12 SOUTH DAKOTA, 511.]

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO CONVEY LAND.—If an aged person, suffering from a complication of diseases, which renders him utterly helpless and causes a most offensive odor, orally agrees with a married woman, an intimate friend, that he will convey certain land to her if she will personally care for him until he recovers or dies, and the service is fully and faithfully performed, but such person dies within a few weeks without having made the conveyance, the other party to the contract is entitled to a specific performance of it by the administrator of the deceased, where the contract is clearly proved, where there is no

question of fraud or inadequacy of consideration, and particularly where the enforcement of the contract will do no injury to third persons.

Suit for specific performance brought by Melissa E. Lothrop against Arthur H. Marble, administrator of Ransom Rathbone, deceased. The defendant appealed from a judgment for the plaintiff.

T. W. La Fleiche and Rice & Polley, for the appellant.

Frawley & Laffey and McLaughlin & McLaughlin, for the respondent.

512 FULLER, P. J. A trial of this action to enforce specific performance of an oral agreement to convey real property, alleged to have been made by and between plaintiff and Ransom Rathbone, a short time prior to his death, resulted in a judgment requiring appellant, as the administrator of the estate of the said Ransom Rathbone, deceased, to execute and deliver to plaintiff a deed of the premises described in the complaint, and from such judgment this appeal was taken. We think the undisputed evidence concerning the agreement reasonably justifies the following facts, found by the court as a basis for its conclusions of law, in conformity with which the decree was entered: 1. That on or about the eighteenth day of October, 1897, at Belle Fourche, in the county of Butte, state of South Dakota, Ransom Rathbone, now deceased, made and entered into an oral agreement with the plaintiff, Melissa E. Lothrop, **513** by which said Ransom Rathbone agreed to convey to said plaintiff lot 8, in block 9, in the town of Belle Fourche, Butte county, state of South Dakota, and at the time of his death owned in fee by said Ransom Rathbone, deceased; and in consideration of the agreement of said Ransom Rathbone to convey said real estate, the plaintiff agreed to and with the said Ransom Rathbone to give her personal attention to said Ransom Rathbone, who was seriously ill, and take care of said Ransom Rathbone until he either recovered from his then serious illness or died; 2. That the plaintiff entered upon the performance of her said portion of said contract, and took the said Ransom Rathbone into her own house, and gave him personal attention during his sickness, and nursed him until his death, in the month of November, 1897; that said Ransom Rathbone was very old and feeble, and was unable to help himself in any way, and the work of caring for him was difficult and unpleas-

ant, and that it would be difficult to fix a money compensation for the services rendered by plaintiff to said Ransom Rathbone during his illness; that the plaintiff fully performed the conditions of said contract on her part; 3. That the expense incident to the care and nursing of said Ransom Rathbone was borne and paid by plaintiff."

As mere payment of the consideration is not generally sufficient performance to take a parol agreement for the purchase of land out of the statute of frauds, the nature of this transaction, as well as the relation of the parties, demands careful consideration. It was clearly shown that Rathbone was aged, and suffering from a complication of diseases, by which he was rendered utterly helpless, and by reason of which it was extremely arduous to bestow the care that his ⁵¹⁴ condition demanded. Through no fault of the deceased his affliction, which was chronic dyspepsia and asthma, involving the lungs, presented much to be dreaded by all who must remain in his presence, and a most offensive odor pervaded the entire house. As far as disclosed by the record, he was without relatives, and respondent and her husband were his most intimate friends, to whom he looked for that care and attention which they alone seemed willing to bestow. In addition to the premises in dispute, the value of which is not shown, he appears to have had other property of considerable value. Being uncertain as to how long he would live, and knowing that peculiar care and attention which money would scarcely secure would be required until death should bring rest, he desired to obtain a home in the family of respondent, whom he knew to be kind. At a time when no motive existed to parley about the value of that which could not be ascertained, he offered her the property for a home in her family during the remainder of his life. This proposition was promptly accepted, and the contract thus made by the parties was fully performed on respondent's part, and the evidence shows that decedent was always ready and anxious to execute a conveyance of the premises to her in accordance with his agreement. Although he survived but a few days after being removed to respondent's home from a room in the rear of a building occupied as a barber shop by her husband, no question as to the inadequacy of consideration is presented, nor was evidence offered concerning the value of the property or of the services. The record shows that Mr. Rathbone entertained an abiding sense of gratitude for the kindly services being administered to him by re-

spondent, and fully realized that reasonable pecuniary ⁵¹⁵ compensation was a matter almost impossible to determine. It follows, therefore, that money was not made the standard by which to measure the value of such care and attention as his pitiable condition would be likely to require for a period as uncertain as the duration of life, and his intention to convey the premises in consideration therefor should, in the absence of fraud or injury to anyone, govern the action of the court. The case is clearly within the rule justifying courts of equity, in carrying into effect parol agreements, to convey real estate, after the full and faithful performance of such service in consideration therefor, as this record discloses: *Rhodes v. Rhodes*, 3 Sand. Ch. 279; *Brinton v. Van Cott*, 8 Utah, 480; *Wall's Appeal*, 111 Pa. St. 460, 56 Am. Rep. 288; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Sutton v. Hayden*, 62 Mo. 101; *Davison v. Davison*, 13 N. J. Eq. 246; *Twiss v. George*, 33 Mich. 253; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685; *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335; *Korminsky v. Korminsky*, 2 Misc. Rep. 138, 21 N. Y. Supp. 611; *Fry on Specific Performance*, 563; *Story's Equity Jurisprudence*, 759. As the enforcement of this contract, which was clearly proved, will do no injustice to third persons, and is perfectly consistent with equity, the judgment appealed from is affirmed.

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO CONVEY REAL PROPERTY.—If the consideration for the purchase of lands consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and he did not intend to measure them by such a standard, the performance of the services entitles the vendee to a specific performance, notwithstanding the contract was in parol: *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490. But the specific performance of a parol contract will not be enforced unless it is established by competent proof to be clear, definite, and certain in all its parts: *Note to Crosdale v. Lanigan*, 26 Am. St. Rep. 555.

SMALL v. ELLIOTT.

[12 SOUTH DAKOTA, 570.]

EVIDENCE, PAROL—WHEN ADMISSIBLE, IN CASE OF DOUBT.—As between the original parties to a written instrument, parol evidence, which does not tend to contradict its terms, is admissible to show the intent and meaning of such persons, when there is something on the face of the instrument that suggests a doubt as to the parties bound, and the court cannot, by inspection, determine the question from the paper creating the obligation.

EVIDENCE, PAROL—ADMISSIBILITY OF, TO EXPLAIN SIGNATURE TO GUARANTY.—As between the original parties to a guaranty, parol evidence is admissible, in an action thereon, to explain the character or capacity in which the defendant signed the instrument, where the letters "Pt" follow his signature, for this abbreviation, not usually affixed to signatures, suggests a doubt as to the party bound, and the court cannot determine the question alone by an inspection of the paper.

ONE WHO SIGNS A GUARANTY AS PRESIDENT OF A BANK IS PERSONALLY LIABLE thereon, unless he shows that the bank had power to execute guaranties and that he was authorized to execute the one sued upon.

Action by Small, as receiver, against Elliott. There was a judgment for the defendant, and the plaintiff appealed.

R. W. Hobart and Aikins & Judge, for the appellant.

A. B. Kittredge, for the respondent.

572 HANEY, J. Plaintiff, as receiver of the original payee, seeks to hold defendant Elliott personally liable upon the following guaranty, indorsed on two promissory notes, executed to the American Banking and Trust Company by the Granite City Manufacturing Company:

"For value received, we hereby guaranty the payment of the within note at maturity, or at any time thereafter, with interest at the rate of 8 per cent per annum until paid, waiving demand, notice of nonpayment, and protest.

(Signed) "J. A. COOLEY.

"G. H. MARSH.

"B. R. COOLEY.

"E. J. ELLIOTT, Pt."

Defendant admits in his answer that he signed the guaranties, "but alleges that he signed the same in the capacity and character of president of the Dell Rapids Bank, and in no other character or capacity whatsoever; that this defendant was the

president of the Dell Rapids Bank, at the time of the execution of said guaranties, and that this defendant never at any time or in any manner received any consideration for said guaranties in his individual capacity; that at the time of the signing and delivery of said guaranties, the owner and holder of said notes had actual knowledge that this defendant did not sign the said guaranties in his individual capacity, but only signed and executed the same as the president of the Dell Rapids Bank as aforesaid, and in his capacity ⁵⁷³ as such; and that the owner and holder of said notes and this defendant intended that said guaranties should be executed by this defendant only as president as aforesaid, and not in his individual capacity, and that they both likewise supposed and believed that said guaranties, so executed, were the guaranties of this defendant in his capacity as president as aforesaid, and did not in any manner make him liable as an individual for the payment of said notes."

Plaintiff contends the answer does not state facts sufficient to constitute a defense: 1. Because parol evidence cannot be received to release defendant; and 2. Because it fails to allege that defendant was authorized by his principal to execute the guaranties, and that his principal had power to execute them. *Western Pub. House v. Murdick*, 4 S. Dak. 207, is cited in support of the first contention. That case is distinguishable from the one at bar. There the parties signed as individuals, and "the agreement constituting the basis of the action showed upon its face that it was the individual contract of the defendants." Here the name of defendant Elliott is followed by the letters "Pt.," an abbreviation not usually affixed to signatures, and the meaning of which cannot be ascertained without the aid of parol evidence. It suggests a doubt as to the party bound, and the court cannot determine the question alone by an inspection of the instruments. "As between the original parties, parol evidence that does not tend to contradict the terms of a written instrument is admissible to show the true intent and meaning of the persons entering into the same, when there is something on the face of the instrument that suggests a doubt as to the parties bound, and the court cannot by inspection determine the question from the ⁵⁷⁴ paper creating the obligation": *Miller v. Way*, 5 S. Dak. 468. The allegations of the answer, taken in connection with the ambiguity apparent upon the face of the guaranties, are, if true,

sufficient to relieve defendant of personal liability to the original payee of the notes, or other person occupying no better position, provided defendant was authorized to execute the guaranties on behalf of his alleged principal: *Metcalf v. Williams*, 104 U. S. 93. The decisions in this class of cases are so numerous and conflicting that it would be idle to attempt a review, even of those that have been examined. Having adopted the doctrine that parol evidence may be received under certain circumstances, we regard the rule announced by the supreme court of Minnesota as sensible, and calculated to produce equitable results. That court holds that when such a word as "agent" or "trustee," which may be descriptive of the person or may be indicative of the character in which the signer contracts, is affixed to the name of a party entering into a contract, it is *prima facie* descriptive only, but that it may be shown by extrinsic evidence that the attached word was understood by all interested as determining the character in which the person using it contracted; that where the party seeks to change the *prima facie* character of the contract on the ground of agency, it is incumbent upon him to prove the fact of the agency; and that he must prove his authority to act as an agent, or his liability upon the contract is necessarily of a personal character: *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21. The same rule as to the burden of proof prevails in Illinois and North Dakota: *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234; *National German etc. Bank v. Lang*, 2 N. Dak. 66. This doctrine does not conflict with the ⁵⁷⁵ rule that parol evidence cannot be received to vary or contradict the terms of a written contract. There is nothing on the face of these guaranties to preclude the construction that Elliott acted otherwise than in an individual capacity. Upon that point the writing itself is uncertain, but there is no uncertainty as to the terms of the contract, and parol evidence cannot be permitted to prove that no one is obligated by the signature, "E. J. Elliott, Pt.": hence defendant should not escape personal liability without establishing the liability of his principal.

It certainly cannot be inferred, from the mere fact that defendant was president of the Dell Rapids Bank, that such bank was a corporation, clothed with power to guarantee negotiable paper for the accommodation of another corporation, and that its president was authorized to discharge the unusual duty of executing such guaranties. The facts stated in the

answer are not sufficient, if true, to release defendant Elliott from personal liability. It was shown upon the trial that the Dell Rapids Bank was and is a banking corporation, organized and existing under the laws of this state; that it was a stockholder in the Granite City Manufacturing Company; that the signers of the guaranties, other than Elliott, were stockholders in the Granite company, of which he was secretary; that when the guaranties were executed W. W. Bolster was president of the payee in the guaranteed notes, and also a stockholder in the Dell Rapids Bank; that these notes were renewals of two former notes, executed by the same maker and guaranteed in the same manner; and that Bolster acted for the American Banking and Trust Company in all these transactions. As to the understanding of the parties respecting the capacity in which Elliott ⁵⁷⁶ signed, the evidence was conflicting, and that issue alone was submitted to the jury. The making of these guaranties was, so far as disclosed by the evidence, purely an accommodation. As it is no part of a bank's business to lend its credit, the circumstances are exceptional under which it can be held liable as an accommodation indorser, surety, or guarantor: *Morse on Banks and Banking*, sec. 65. In this case the proven facts fall far short of showing that the Dell Rapids Bank had power to execute the guaranties sued upon; but, if it had, it cannot be contended that the president of any bank has inherent power to execute such contracts. Indeed, the cashier of a bank will not, by reason of his official position, be presumed to possess such power: *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. Neither the answer nor evidence is sufficient to establish the bank's liability. The judgment of the circuit court is reversed and a new trial ordered.

PAROL EVIDENCE—ADMISSIBILITY OF, TO EXPLAIN WRITINGS.—Parol evidence is admissible to explain a writing: See monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 600, on subsequent parol agreement to vary a writing. If it is uncertain on the face of an instrument whether it was intended to bind the principal or the agent, parol evidence can be admitted to explain such latent ambiguity: Note to *Tarver v. Garlington*, 13 Am. St. Rep. 631. Parol evidence is admissible to show whether or not a corporation is bound by an instrument executed by an officer in his individual name: Note to *Richmond etc. R. R. Co. v. Snead*, 100 Am. Dec. 678. It is admissible to show that an acceptance of a bill or draft was in an official capacity, as the treasurer of a corporation, and not in individual capacity: *Lafin etc. Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68.

THE PRESIDENT OF A CORPORATION HAS NO AUTHORITY, AS SUCH, TO ACT AS ITS AGENT, and a corporation cannot be bound by a contract made by its president, unless power to bind it is given to him by the act of incorporation, or he is authorized by the corporation to make the contract: *Wait v. Nashua etc. Assn.*, 66 N. H. 581, 49 Am. St. Rep. 630. Compare *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184. The making of accommodation paper, or the loan of one's name as security for another, does not fall within the ordinary business in which persons engage, and authority to use the principal's name for that purpose must be specially given: *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728. A corporation has no power to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so: See monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 164, on the doctrine of *ultra vires* in relation to the contracts of private corporations.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

STANFORD v. HOWARD.

[103 TENNESSEE, 24.]

GAMING—RECOVERING PROPERTY LOST AT.—If a person loses specific property at gaming, and afterward peaceably regains possession of it, he may retain it against the winner.

GAMING—RECOVERING MONEY—NOTE GIVEN FOR RETURN OF.—Where money lost in a gambling transaction is returned to the owner under the pretense of a promise to repay it, and a note is given for the amount, the transaction amounts to a peaceable recapture of the money, which the loser may retain, and the note is not collectible. This is especially true where the state statutes permit a loser to recover property lost at gaming.

Barham & Timberlake, for the appellant.

William M. Taylor and F. M. Davis, for the appellee.

24 WILKES, J. This was a suit before a justice of the peace upon a note executed by Howard ²⁵ to Stanford for two hundred dollars, dated December 21, 1896, and due one day after date.

On appeal to the circuit court from a judgment against defendant, the cause was tried before the court without a jury, and plaintiff was denied any relief, and he has appealed and assigned errors. The execution of the note is not denied, and it is not claimed to have been paid, but it is said that it was executed on Sunday, and based upon a gambling consideration, and is therefore void.

It appears that plaintiff and defendant, with Overman and Joiner, two other persons, engaged in a game of poker, com-

mencing on Saturday night, at the rooms of defendant. Joiner, about daylight, left the game. He also left all of his money, about twenty-three dollars, having lost it in the fortunes of the game. The other parties continued the game until some time on Sunday morning—one witness says about 10 o'clock, another says about time to go to Sunday-school. All the parties appear to have gone to bed for a short while after the game closed. As a result of the game, Joiner lost all he had, about twenty-three dollars; Overman won twenty-five or thirty dollars; Dr. Howard, the defendant, lost two hundred and sixteen dollars out of two hundred and eighteen dollars, which he had when he entered the game, and plaintiff was a winner of something over two hundred dollars.

Dr. Howard states that after 3 o'clock he was so drunk he did not know what he was doing, ²⁶ and has no recollection of what transpired. Other parties testify that while all parties were drinking, no one was so intoxicated as not to know what was being done. Dr. Howard sent for plaintiff, and asked him if he knew what had become of his money, when plaintiff informed him he had won it. Howard then said he needed the money for a special purpose, and would like to borrow it from plaintiff. Plaintiff loaned him two hundred dollars, and took his note, payable one day after date, and this is the note sued on. Plaintiff's theory is that this note is in nowise connected with the gambling transaction, that it is simply and purely one for borrowed money, and that it cannot be definitely stated that the money loaned was that won from defendant, as the money changed owners several times during the progress of the game, and besides he had eighty dollars of money when he first entered the game, and had other money in his pocket after he had let defendant have the two hundred dollars.

It has been held that if a person lose specific property at gaming, and afterward peaceably regain possession of it, he may retain it against the winner: *Hutchinson v. Edwards*, Mart. & Y. 263; *Kegler v. Miles*, Mart. & Y. 426, 17 Am. Dec. 819; *Neely v. Lyon*, 10 Yerg. 473, 475; *Collomb v. Taylor*, 9 Humph. 689, 702; *Garrett v. Vaughn*, 1 Baxt. 119.

In the first above-styled case Wallace won a ²⁷ mare from Burdin, and he was put in possession of her and sold her to Anderson. She escaped from Anderson and went back to Burdin's stable, who refused to give her up, but sold her to Hale, who sold her to Edwards, and Edwards swapped her to

Peters. Anderson claimed the mare from Peters, and Peters, thinking he had the best title, gave her up, and Peters' administrator brought an action of assumpsit for her value against Edwards, on the idea that his title had failed. The contest was thus between the title derived from Wallace, the winner, and that derived through a sale from Burdin, the loser, after he had recaptured her. The decision was in favor of the latter title under the charge of the court to that effect. We have no case more to the point than this in our own books, and under it we would feel justified in holding that if Howard as a fact retook the identical money he lost to plaintiff, even though by a peaceable trespass, he could hold it as against the winner.

It is urged it cannot be said with absolute certainty that the money which Stanford let Howard have was the identical money which he had received from him upon the wager or betting. In addition, he did not recapture or retake it, but obtained it under a contract or promise to repay it the next day. We cannot doubt, under the record, but that Howard, when he applied for the money, intended to keep it after he received ²⁸ it, and to refuse to give it up, but such was not his purpose, as expressed to Stanford; on the contrary, there was an express promise to repay it to him as his own and as a loan. Stanford could as well let him have other money, and Howard, in that event, could not have treated that as a recapture of his own money.

We are referred by opposing counsel to two Kentucky cases bearing somewhat on the matter, and yet not directly, but they are diametrically opposed to each other.

The first is the case of *Bell v. Parker*, 3 Dana, 51, 28 Am. Dec. 55, decided by the supreme court of Kentucky, in April, 1835. In that case Bell won a horse from Parker at cards, and the horse was delivered to him. Bell some time afterward sold the horse back to Parker, and took his note for seventy-five dollars. He failed to pay the note, and Bell took judgment on it. This judgment was enjoined in chancery under the facts as stated, but the injunction was dissolved in the supreme court, and the winner was allowed to recover on the note. The court held that when the horse was delivered the original gaming transaction was closed, and the horse was Bell's property. The sale to Parker was a new contract, based upon a valid consideration, and one that Bell had a right to make to Parker or anyone else, and was not a revival or re-

newal of the original contract. This case is also reported in 28 Am. Dec. 55, and is ²⁹ said to be supported by the cases of *Downs v. Quarles*, Litt. Sel. Cas. 489, 12 Am. Dec. 337, and *Greathouse v. Throckmorton*, 7 J. J. Marsh. 16. This case is evidently based upon the proposition that the loser cannot recover property lost at gaming after it once comes to the possession of the winner, but such a rule, while good at common law, does not prevail under the statutes of this state: *Whiteside v. Tabb*, Cooke, 383; *Shannon's Comp. Stats.*, secs. 3161-3163 et seq.; *Nichol v. Batton*, 3 Yerg. 474.

In the latter case, decided in Kentucky, 1846, the case of *Brown v. Watson*, 6 B. Mon. 588, it appeared that Watson staked a horse upon a race with Brown. The race was not run, but Watson gave up the horse as a forfeit to Brown under their contract. Some time after Brown sold the horse to Watson, and took his note, and took judgment on it, and the court below perpetually enjoined its collection, and the supreme court affirmed the decree of the lower court. The court treated the matter as if the horse was actually won on a race. The court held that the contract was illegal under the act of 1833, and that a court of equity could relieve. It would be difficult, if not impossible, to reconcile these two Kentucky cases, but, after all, they are not directly in point.

The statutes of Tennessee provide a remedy for the recovery of money or property lost at gaming ³⁰ (*Shannon's Comp. Stats.*, sec. 3161), and it has been held that a note of a third person delivered up on a wager may be recovered under this statute if sued for in time: *Woodson v. Gordon*, Peck, 197, 14 Am. Dec. 743; *Revier v. Hill*, 1 Sneed, 405.

It has also been held that gaming securities given by the loser are void, and equity will compel them to be delivered up and canceled; so that the statutory remedy is not exclusive: *Rucker v. Wynne*, 2 Head, 620, 621.

While the matter is not free from difficulty, we are of opinion the decree of the chancellor in this case should be sustained.

We think it quite clear that the money which Howard borrowed from Stanford was the same money, or part of it, that Stanford had won from him. It was about the same amount, and they were the only two players who had this amount. So that the identical money which Howard lost during the game was the same that Stanford won and let him have upon the note. While the matter took the guise of a contract of loan

between Howard and Stanford, it is clear that Howard looked upon it as a peaceful recapture of his own money which he intended to hold. If it had been a horse, and Stanford, after the horse was delivered to him, had loaned him to Howard to ride, Howard, though ostensibly receiving him for this purpose, could have repudiated the bailment and kept the horse as ³¹ his own, regardless of the contract to return him. So with the money, the only difference being that the horse could more easily be identified than the money. If Stanford had won a horse and saddle, and Howard had recaptured the horse but not the saddle, he could keep the horse and lose the saddle. And so with the money—if Howard did not succeed in getting all, he could retain so much as he could get and let the remainder go.

There can be no doubt but that Howard could, under the statute, have sued Stanford and collected back the money, but if on trial this note is held valid, all Stanford would have to do would be to offset Howard's demand by the note, and thus defeat a recovery, and work a complete evasion of the law.

Upon the whole case we are content to affirm the decree of the chancellor refusing any relief on the note.

The appellant will pay costs.

WAGER—PROMISSORY NOTE.—A court of equity will not enjoin a judgment at law rendered on a promissory note given for the price of a horse originally lost at gaming, and actually delivered to the winner, but afterward sold to the loser upon his executing to the winner the note for the price which he agreed to pay on the repurchase: *Bell v. Parker*, 3 Dana, 51, 28 Am. Dec. 55.

O'ROURKE v. CITIZENS' STREET RAILWAY COMPANY.

[103 TENNESSEE, 124]

EVIDENCE—RES GESTAE.—SUDDEN EXCLAMATIONS AND OUTBURSTS OF BYSTANDERS, as well as of participants, are parts of the *res gestae*, and as such may properly be introduced in evidence whenever the occurrence producing them is undergoing judicial investigation. Hence the conduct of the plaintiff's children when he is ejected from a street-car forms a part of the *res gestae*, and is admissible in evidence in a suit against the company.

APPEAL — REVERSIBLE ERROR—INSTRUCTION.—The giving of legal abstractions in a charge to a jury is not reversible error, unless it appears that they may have been harmful.

A RAILROAD TICKET IS BUT EVIDENCE of the contract of carriage between a carrier and a passenger. One who makes a valid contract is entitled to passage according to its terms, even though the ticket given him is defective in failing to express those terms, and if he is expelled from the train on account of such defective ticket, the carrier is liable for all proximate damages resulting therefrom. This rule applies to a transfer ticket issued by a conductor on a street railway.

STREET RAILWAYS—TRANSFER TICKET.—A CONDITION printed on the back of a transfer check issued by a street railway company, requiring the passenger to examine the date, time, and direction indicated by the conductor's punch marks, and see that they are correct, is unreasonable and void, because a passenger is not bound to verify the act of the conductor in issuing a transfer.

STREET RAILWAYS—TRANSFER TICKET.—A condition printed on the back of a transfer check issued by a street railway company, that, in case of controversy with the conductor about the ticket and its refusal, the passenger shall pay another regular fare, and apply at the office of the company for a refunding of the excessive charge within three days, is unreasonable and void, since it places the entire burden of the controversy upon the wronged passenger, and none upon the wrongdoing company.

Gantt & Patterson, for the appellant.

Turley & Wright and E. E. Wright, for the appellee.

126 CALDWELL, J. Hugh O'Rourke brought this action against the Citizens' Street Railway Company **127** to recover damages for an alleged wrongful and unlawful expulsion from one of its cars. The jury returned a verdict against him, and upon that verdict a judgment of dismissal was entered by direction of the court.

Having appealed in error, O'Rourke seeks a reversal, remand, and new trial for several reasons assigned.

Shortly after 2 o'clock in the afternoon of March 7, 1897, the plaintiff, with his wife and three small children, embarked upon a Beale and Lane avenue car of the defendant in the city of Memphis, and, after paying proper fares, requested and received from the conductor in charge the requisite number of tickets of transfer to a north-bound Main street car of the same company. At the proper place for the contemplated transfer the plaintiff, his wife and children, disembarked from the first car mentioned, and promptly took passage upon the other one. The conductor of the latter car, after examining the transfer tickets tendered by the plaintiff, said to him: "You were a long time waiting for this car." Plaintiff replied: "We ain't waited two minutes. We just got off that Beale and Lane avenue car, going south." Continuing the dialogue, the

conductor said: "Well, you will have to get off or pay your fare"; and the plaintiff remarked: "I won't do either; I won't get off or pay my fare. I have paid my fare once, and that is, I think, sufficient to ride on." ¹²⁸ The conductor then caused the car to be stopped, took the plaintiff by the arm, and ejected him and his family from the car.

The witnesses were not harmonious in their several versions of the conductor's manner and actions in effecting the expulsion. The plaintiff testified that the conductor was harsh and severe, and that he "jerked" the plaintiff's arm so roughly as to make it "sore for several days." The conductor testified that he was respectful and used no more force than was necessary. In the course of his testimony the plaintiff said there was some confusion on the car, that his little girl and his little boy were both crying, and that he "thought the little girl would go into spasms." The trial court excluded the statement about the manifestations of the children, saying that the fact of "their excitement cannot be taken."

In this ruling his honor was in error. The excluded testimony was competent, and should have been considered. It related to a fact which formed a part of the *res gestae*, and which, in the minds of the jury, might have shed some light on the important issue as to the real demeanor of the conductor toward the plaintiff. The spontaneous manifestations of the children were just so much of the transaction itself, and cannot be separated from it. Proof of them is essential to a true and complete history of the thing done.

¹²⁹ Sudden exclamations and outbursts of bystanders, as well as of participants, are parts of the *res gestae*, and as such may properly be brought forward in evidence whenever the occurrence producing them is undergoing judicial investigation: *Twomley v. Central Park etc. R. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 163; *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 324; *Kleiber v. People's Ry. Co.*, 107 Mo. 240.

The plaintiff's contention is that the cries of his children at the very moment tend to corroborate his theory of violent expulsion. Undoubtedly, the children were excited and alarmed by what they saw and heard; but whether gentle expulsion of their father would have produced that result, with children so young, as readily as violent expulsion. this court does not decide. That is a matter for the consideration of the jury.

The expulsion, whether violent or otherwise, resulted primarily from a mistake of the first conductor in punching the transfer tickets so as to indicate their issuance at 1:40 P. M., when, as a matter of fact, they were issued nearly an hour later. The second conductor, judging the tickets by the punch marks, assumed, over the statement of the plaintiff to the contrary, that he had violated the rule of the company requiring all transfer passengers to take the first connecting car, and upon that assumption treated the tickets as expired, and, under another rule of the company, ¹³⁰ expelled the plaintiff when he refused to pay additional fare.

In his charge to the jury the trial judge said: "A person may lose his right to continue his journey as a passenger upon a car under the following circumstances: 1. When he acts in such a way as to endanger the peace and comfort of the other passengers, he has no right to continue his journey upon the car; 2. When he presents to the conductor, as an evidence of his right to ride, a ticket or transfer check which shows upon its face that he has no such right, then he cannot continue his journey upon such ticket; 3. When the conductor, who declined to accept the ticket or transfer, gave such explanation of the defect in the ticket or transfer as would have satisfied any ordinarily reasonable person that the conductor was justified in refusing to take it, then he cannot continue his ride."

Though entirely sound in law, the first of these three propositions is wholly inapplicable in the present case, there being no evidence tending, in the slightest degree, to show that the plaintiff was guilty of conduct calculated to "endanger the peace and comfort of other passengers." Legal abstractions in a charge are not always hurtful, and, unless it appears that they may have been so, the giving of them, while never to be approved, ¹³¹ is not reversible error. In this instance it is not improbable that the jury was misled into the belief that the court thought there was evidence on this particular point, and expected its consideration in the making up of the verdict; hence the irrelevant instruction may have been in some degree prejudicial to the plaintiff, and its inclusion in the charge is therefore noted as one ground of reversal.

The second proposition is one about which the authorities are in irreconcilable conflict. Many of them, like the charge of the learned trial judge, treat the face of the ticket as the sole criterion of the holder's right of passage, justify his ejection in case of defective ticket and refusal to pay fare, and

allow him, as his only remedy therefor, an action of damages for the negligent mistake of the agent, or for breach of contract, and not for expulsion (notably *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. Rep. 197; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Hufford v. Grand Rapids etc. Ry. Co.*, 53 Mich. 118; *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913; *Yorton v. Milwaukee etc. Ry. Co.*, 54 Wis. 234, 41 Am. Rep. 23; *Western Md. R. R. Co. v. Stockdale*, 83 Md. 245; *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; 4 *Elliott on Railroads*, sec. 1594), while others, on ¹³² the contrary deny the ticket such conclusive force and dignity, and rule that the passenger has the right to rely upon the acts and statements of the ticket agent or conductor, and that, if he be expelled on account of a defective ticket when he has acted in good faith and is without fault, the carrier is liable in damages for such expulsion: *New York etc. R. R. Co. v. Winter*, 143 U. S. 60-75; *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4; *Ellsworth v. Chicago etc. Ry. Co.*, 95 Iowa, 98; *Northern Pac. Ry. Co. v. Pauson*, 70 Fed. Rep. 585; *Hot Springs Ry. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913; *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434; *Georgia R. R. Co. v. Olds*, 77 Ga. 673; *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 634, 8 Am. St. Rep. 859; same case decided otherwise on former appeal and reported in 53 Mich. 118; *Murdock v. Boston etc. R. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, and other cases.

We concur in the latter view, and hold that a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket furnished him may not in any true sense express the contract. It is the contract and not the ticket that gives the right to transportation. ¹³³ The ticket is but an evidence of the contract, made out and furnished by the carrier; and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance.

The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right and the passenger is authorized to believe and presume that it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made.

The ticket, whether for transfer, as in the present case, or for original passage, may well be called the carrier's written direction by one agent to another agent concerning the particular transportation in hand; and if the direction be contrary to the contract, and expulsion follow as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent.

In our opinion, the legal result, in such a case, cannot be influenced by the fact that the carrier has conducted the transaction through two agents instead of one, for the combined acts of the two agents constitute but one continuous act of the carrier. Each agent is the alter ego of the carrier. The issuance of the void ticket is the fault of the first agent, the expulsion is the fault of ¹³⁴ the second agent, and both faults are those of the principal, which stands before the court as if it had made the contract, issued the ticket and expelled the passenger through one and the same agent.

Beyond question, carriers have the legal right to require passengers to procure and present tickets, but that does not imply that passengers who have done their part in the matter, may be rightfully expelled from the car because the tickets they offer chance to be defective, or void. Before the rule of expulsion for want of proper tickets can be made absolute and universal in its application, the carriers must discharge the reciprocal duty of absolute and universal accuracy in the issuance of the tickets. The latter would be impossible, the former harsh and unreasonable. To require a passenger, who has made a valid contract for transportation and paid the requisite fare, as did the plaintiff, to retire from the car and suspend his journey because of an original defect in the ticket furnished him by the company's agent is to visit the wrong of the offender upon the offended; it is to make the rightful passenger suffer for the fault of the carrier, and that, too, in the latter's interest. This court will not yield its assent to a result so unjust and oppressive.

The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently ¹³⁵ sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car and that the first conductor must have wrongly indicated the hour of issuance on the face of the ticket.

On that statement the plaintiff should have been allowed to pursue his journey to its end. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of the contract, for which he became entitled to recover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained.

It may be true, as suggested in some of the authorities (Frederick v. Marquette etc. Ry. Co., 37 Mich. 342, 26 Am. Rep. 531; Poulin v. Canadian Pac. Ry. Co., 52 Fed. Rep. 197; 4 Elliott on Railroads, sec. 1594), that the carrier can dispatch its business more conveniently and expeditiously, and can avoid losses through fraud and imposition more readily, by treating the ticket as conclusive evidence of the passenger's right to be carried, than by taking and adopting his ex parte statement of the real contract, when claimed to be different from the ticket; yet such ends, desirable as they may be and are, afford no legal sanction for the expulsion of a passenger who is without fault and whose ticket fails alone through the mistake ¹³⁶ or negligence of the carrier's agent, nor does their desirability render the expulsion of such person any less a tortious breach of the contract. Every expulsion of a rightful passenger is wrongful.

It is no answer to the legal right of the bona fide passenger to say that the carrier's general interest is better subserved by his expulsion than by his carriage, by the violation of his contract than by its observance. His right is not to be affected by the mistakes of ticket agents, or the attempted frauds of imposters; these are to be met, if met at all, otherwise than through a rule that excludes innocent as well as fraudulent passengers. It is not allowable to punish the innocent with the guilty, to prevent the escape of the guilty.

A ticket agent, on selling ticket to proposed passenger, referred him to conductor for privilege of stopover at intermediate station; conductor authorized stopover, but instead of issuing stopover check only punched passenger's regular ticket, telling him that would be sufficient; second conductor, following rule of company, refused to recognize the punched ticket, and expelled passenger when he refused to pay fare; a judgment in favor of the plaintiff for ten thousand dollars was affirmed upon the ground that the expulsion was unlawful, the court saying: "The reason of such rule is to be found in the principle that where a party does all that ¹³⁷ he is required to do under the terms of contract into which he has entered, and is

only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract": *New York etc. R. R. Co. v. Winter*, 143 U. S. 60-73.

A street-car conductor issued transfer ticket, punched at two time marks, 7:30 A. M. and 9 A. M., the conductor of car to which transfer was made refused to accept ticket, on ground that it was two hours old, and ejected passenger on his refusal to pay fare, although informed that the ticket was issued at 9 o'clock, just before passenger got on car. Held, that the company was liable in damages for an unlawful ejection, the company, and not the passenger, being responsible for the defective or doubtful character of the ticket: *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4.

By mistake a ticket agent sold a ticket dated back three days; the passenger presented it on the day purchased, but was expelled by the conductor because the ticket was antedated and holder refused to pay train fare; company held liable for wrongful ejection, the court saying the validity of the ticket depended upon the actual time of sale, and not upon its date: *Ellsworth v. Chicago etc. Ry. Co.*, 95 Iowa, 98.

The holder handed return coupon to proper agent to be stamped, at same time calling for sleeping-car ticket; the agent returned coupon folded with sleeping-car ticket, and holder put them in his pocket without examination. When presented on train it was discovered that agent had not in fact stamped coupon, and for that reason the conductor refused to accept it, and expelled holder upon his refusal to pay fare. Held, that the holder, having done his part, was a legal passenger, and that the railway company was liable in damages for his expulsion: *Northern Pac. Ry. Co. v. Pauson*, 70 Fed. Rep. 585.

An agent sold a canceled ticket and delivered it as a good one; the conductor refused it, and the passenger paid the fare a second time to prevent ejection. He sued for damages, and the case was twice before the supreme court of Michigan. On the first appeal the court said that "as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel" (*Hufford v. Grand Rapids etc. Ry. Co.*, 53 Mich. 118, 8 Am. St. Rep. 859), and on the second appeal the court, among other language, used the following: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid

to the agent who gave him the ticket he ¹³⁹ presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks": *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 634, 8 Am. St. Rep. 859.

In concluding this part of this opinion, it should be remarked that our own cases of *Louisville etc. R. R. Co. v. Fleming*, 14 Lea, 146, *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776, and *Railroad v. Turner*, 100 Tenn. 224, are not in fact, and are not claimed to be, in point on the principal issue in the present case. The most that was decided in the first and second of them, in reference to a railway ticket, was that persons desiring to travel upon railway trains must procure and present tickets, when required by a rule of the company; and the last one dealt with a different branch of the ticket question, that of notice.

The meaning of the third proposition in that part of the charge heretofore quoted is somewhat obscure; yet, its effect seems to be that a passenger "cannot continue his ride" on a transfer ticket when the conductor points out such defect in it as justifies the conductor, under the rules of the company, "in refusing to take it." The instruction thus interpreted is erroneous, in that it impliedly repeats the proposition that the ticket is the sole criterion of the holder's right to passage, and also in that it attaches unwarranted ¹⁴⁰ importance to the explanation of the conductor. No explanation the conductor might make could affect the plaintiff's legal right as a passenger. That right depended upon the contract and not upon the face of the ticket, and it was incumbent on the conductor to heed the plaintiff's explanation and observe the contract, rather than upon the plaintiff to accept the conductor's explanation as fatal and abandon his contract. The disclosure of the fault of one agent by another agent could not absolve their principal from the obligation of the contract, and render the plaintiff a trespasser. Such a result cannot be justified in law, whatever the rule of the company may be.

On the face of the transfer check were printed the following words:

"Transfer.—Passenger in accepting this transfer agrees to read and be governed by the conditions on the back hereof, subject to the rules of the company.

"G. F. JONES, V. P. & G. M."

The court instructed the jury that this requirement and all of the conditions on the back were reasonable, and that plaintiff was bound to comply with them.

In this instruction the court erred in at least two respects. Among the conditions printed on the back of the transfer check was one in this language: "Part of the conditions upon which this transfer is given and accepted are that the passenger ¹⁴¹ examines date, time, and direction, and sees that the same are correct, and complies with all its conditions."

This condition is unreasonable, because no passenger can be bound to verify the act of the conductor in issuing a transfer check; and also because no inexperienced passenger, however intelligent, could, in the time at his command on so brief a trip, "examine date, time, and direction" indicated by the punch marks, and, without an explanation, see "that the same are correct." There is no little complication about these three items on the face of a transfer check, and especially about the matter of indicating the "time" of issuance. The plaintiff made no examination on receiving his check from the first conductor, and could scarcely understand the meaning of the punch marks when explained by the conductor who expelled him. The complexity of the checks, and the unreasonableness of the rule requiring a passenger to verify its correctness when issued, could hardly be better illustrated than by a statement from this record that the learned trial judge himself, with one of the very checks here involved before him, was not able to understand its meaning without a minute explanation.

At the trial the court, for its own information on the subject, propounded certain interrogatories to one of the officers of the defendant about the meaning of one of these checks. Those ¹⁴² questions and the answers thereto are as follows:

"The Court.—I wanted to ask you how would anybody know what these figures over there on the right end stand for? What is there to indicate the hours and minutes outside of just the figures themselves?

"A. Well, I don't know how I could explain that, Judge.

"The Court.—What are those figures all over the right-hand end of the ticket?

"A. The black figures are the hours and the little figures indicate 10, 20, 30, 40, and 50 minutes.

"The Court.—I don't catch it exactly.

"Witness.—Well, here the figure is 1 o'clock, and if the '4' is punched it would be 1:40, and if the '2' is punched it would be 1:20.

"The Court.—Oh, yes, I didn't catch it; I didn't understand the thing. It would be 1:20 if the 2 is punched, and if the 3 is punched 1:30, and if the 4 is punched 1:40, and if the 5 is punched 1:50?

"A. Yes, sir; same transfer that is used all over the country."

It cannot be fair or just or reasonable to require passengers, in the hurry of rapid street-car travel, to decipher at their peril a check whose meaning so intelligent a judge cannot ascertain by careful and deliberate inspection.

Another condition on the back of the check ¹⁴³ was expressed thus: "In accepting this transfer, passenger agrees that in case of controversy with conductor about this ticket and its refusal, to pay the regular fare charged, and apply at the office of the company for refund of same within three days."

This condition is unreasonable, in that it makes the conductor, for the time, the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare though his ticket may be refused without sufficient cause; and, further, in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company, which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully exacted. It puts all of the burden of the "controversy" upon the wronged passenger, and none upon the wrongdoing company, and thereby makes the just suffer for the unjust.

Reverse and remand.

RES GESTAE.—THE CONDUCT AND EXCLAMATIONS of passengers in a car at the time of an accident are a part of the res gestae, and admissible in evidence in an action against the railroad company for damages for personal injuries: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Twomley v. Central Park etc. R. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162. See, too, *Wilson v. Southern Pac. Co.*, 13 Utah, 352, 57 Am. St. Rep. 766.

ABSTRACT INSTRUCTIONS to a jury are improper: *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21. But nonprejudicial error cannot work a reversal of judgment: *Farwell Co v. Wolf*, 96 Wis. 10, 65 Am. St. Rep. 22.

A RAILROAD TICKET is not a contract, but merely evidence thereof: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329; it does not constitute the contract between the parties unless made so by express agreement: *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St. Rep. 146. Where a ticket agent sells the wrong ticket to a person, the latter may recover damages from the railroad company if ejected from the train on being unable to pay an additional fare: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744, 22 Am. St. Rep. 499; *Callaway v. Mellett*, 15 Ind. App. 366, 57 Am. St. Rep. 238. A railway company cannot urge the error of its agent as an excuse for disregarding its own ticket, nor as a ground for relief from damages for ejecting a passenger from its cars: *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434.

NANZ v. PARK COMPANY.

[103 TENNESSEE, 299.]

MECHANIC'S LIEN LAWS are liberally construed so far as the property to which the lien attaches is concerned.

MECHANIC'S LIEN—WHO ENTITLED TO.—A STATUTE giving a lien upon land upon which "a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected or improvements made," by special contract, refers to things constructed upon the land, such as buildings, machinery, fixtures, and structures, and not to the enriching of the soil and beautifying the grounds by planting flowers, shrubs, and trees, and by grading and graveling the grounds and walks.

Lucky, Sanford & Fowler, for the appellee.

Jesse L. Rogers, for the appellant.

300 WILKES, J. The Cumberland Gap Park Company owned certain real estate at Harrogate, Tennessee, upon which was erected the Four Seasons Hotel. Nanz & Neuner are florists at Louisville, Kentucky, and made a contract with the company, in writing, to furnish and plant flowers and shrubbery, to build a rustic bridge, and grade the walks and ways about the premises, for the aggregate sum of three thousand dollars. They carried out their contract, but received only part of the amount agreed to be paid, and there is a balance owing under the contract of two thousand seven hundred and forty-four dollars and thirty-three cents, besides interest. Nanz & Neuner insist that they have a lien upon the buildings and grounds of the company for the amount due them by the terms and under the provisions of our statutes relating to liens of mechanics, and embodied in section 3531 of Shannon's

Code. The company has become insolvent, and is being or has been wound up under a proceeding in the federal court, and the purchaser under decrees in that cause, with the company and others, is resisting the right to any lien as claimed. The chancellor held that a lien exists under the statute for the character of work done and materials furnished in this case, and gave decree for such lien, and judgment for the amount due, and the court of chancery appeals has affirmed this holding, and there is an appeal to this court, and an assignment of error. The statute referred ³⁰¹ to, and under which the lien is claimed, is as follows:

“Mechanic’s lien, and lien for labor and materials.—There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made, by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work, or any part of the work, or furnishes the materials, or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who do any portion of the work, or furnish any portion of the material for the building contemplated in this section”: Shannon’s Code, sec. 3531.

It has been held in a number of cases in this as well as in other states that a liberal construction should be given to mechanic’s lien laws: *Barnes v. Thompson*, 2 Swan, 314; *Alley v. Lanier*, 1 Cold. 540; *Steger v. Arctic Ref. Co.*, 89 Tenn. 453; *Ragon v. Howard*, 97 Tenn. 334; 15 Am. & Eng. Ency. of Law, 179; *White Lumber Lake Co. v. Russell*, 22 Neb. 126, 3 Am. St. Rep. 262; *Harrison v. Homeopathic Assn.*, 134 Pa. St. 558, 19 Am. St. Rep. 714; *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497, 35 Am. St. Rep. 767.

And this liberal construction applies to the subject matter—that is, the property to which the lien attaches and against which it may be enforced: ³⁰² *Steger v. Arctic Ref. Co.*, 89 Tenn. 453. While we recognize these rules as well established, they only apply in favor of parties who are clearly entitled to such lien under the statute. In *Thompson v. Baxter*, 92 Tenn. 305, 36 Am. St. Rep. 85, it is said: “The claimant must make it clearly appear that he has a lien. This lien is purely statutory and unknown to the common law. Only those enumerated and embraced in the statute are entitled to it. A liberal construction of the mechanic’s lien law does not mean

that they shall be liberally construed in embracing or including others than those enumerated in the statutes. No one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none."

The mechanic's lien law being purely a creation of and regulated by statute, we can derive but little aid in the proper construction of our own statute from the decisions of other states, unless the statutes are identical in terms, which is not probably the case in any two states in the Union, nor are the holdings uniform. To illustrate: The decisions in many states hold that architects are entitled to the lien of mechanics: See cases collated; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262-264. But in this state it is held they are not entitled to such lien: *Thompson v. Baxter*, 92 Tenn. 305, 36 Am. St. Rep. 85. And ³⁰³ this is the holding in many cases in other states: See *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 265, 266, note.

The statutes in the several states are more or less specific in enumerating the kind of work done, labor, and material furnished, and improvements made, and in some states, in express terms, the lien is given for fences, walls, pavements, etc. But, generally, terms are used which indicate that the lien is to exist only for buildings, or some kind of structures of wood, stone, or metal erected on the land, or fixtures or machinery placed in the buildings, or connected therewith, and under such statutes it has been held that the lien does not extend to and embrace fences, walls, swings, bridges, seats, etc.: See a collation of cases in *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694, and notes.

Thus it has been held that a statute which gives a lien for the building, repairing, or ornamenting any house, or other building, or appurtenance thereto, gives no lien upon a lot for curbing, grading, and paving the street in front, though done under a contract with the owner of the lot: *Smith v. Kennedy*, 89 Ill. 485.

In Indiana, it is held that making a pavement in front of a lot, or abutting thereto, cannot be regarded in any sense as the construction or repair of a building on such lot: *Knaube v. Kirschem*, 39 Ind. 217; so in *Yearsley v. Flanigen*, 22 Pa. St. 489. When, however, the pavement ³⁰⁴ is laid by one who furnishes the brick and stone work about the building, including the pavement, the contract being entire, the lien

will cover cost of the pavement as well as the building: *Yearsley v. Flanigen*, 22 Pa. St. 489; *Dugan Cut Stone Co. v. Gray*, 114 Mo. 497, 35 Am. St. Rep. 767; *McDermott v. Claas*, 104 Mo. 14. The same principle is applied in *Steger v. Arctic Ref. Co.*, 89 Tenn. 453. In *Henry v. Plitt*, 84 Mo. 237, it is held that when walks and fences are constructed under one entire contract, the mechanic has a lien for the labor and material expended on them if they are appurtenant to the building and constructed at the same time. In Oregon, it was held that a person employed to grade, fill, and otherwise improve a lot in an incorporated city, has a lien for his work in that state: *Pills v. Collingsworth*, 20 Or. 432. But in Minnesota it is held that a mechanic has no lien for filling in and grading earth about buildings already erected, when the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land: *Pratt v. Duncan*, 36 Minn. 545, 1 Am. St. Rep. 697. Again, in *Drew v. Mason*, 81 Ill. 498, 25 Am. Rep. 288, it is held that furnishing and fixing a lightning rod on a house is not within the statute giving a lien for labor and materials in building, altering, repairing, or ornamenting a house. In *Pratt v. Duncan*, 36 Minn. 545, 1 Am. St. Rep. 697, it ³⁰⁵ is stated that the statute of Minnesota gives a lien for the erection, alteration, or repair of any house, mill, manufacturing, or other building or appurtenances, and it was held that this language would not authorize a lien for improvements or operations on the soil merely which do not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land, and which are wholly unconnected with the erection of or work upon such artificial structures. The lien in that case was claimed for earth furnished and labor done in banking up the basement and foundation walls of buildings on the premises and in filling and grading the grounds for the purpose of sodding, and the lien was in that case refused. These holdings are largely based, if not altogether, upon the special wording and phraseology of the statutes under which they are made, and, while they are instructive, they are not controlling under our statute. In the present case, the contention is that the lien rests upon a proper construction of the terms used in the statutes, "improvements made"; but we think it evident from a reading of the statute that the improvements therein referred to are such as buildings and structures. The latter part of the section uses the expression, "building contemplated in this sec-

tion"; and this construction of these terms is strengthened by the use and the connection in which they are used in sections 3533, 3534, 3540, ³⁰⁶ 3542. In Missouri, where the decisions are very liberal in sustaining and extending the lien, it has been held that the word "improvements" will not cover engines, boilers, etc.: *Collins v. Mott*, 45 Mo. 100. In *Brown v. Wyman*, 56 Iowa, 452, 41 Am. Rep. 117, it is held that a person who breaks a prairie and prepares it for cultivation is not entitled to a lien given for any building, erection, or "improvement upon the land." In this case it was said that the breaking of the prairie was an improvement of the land, and so was each annual plowing. Fertilizers cause an improvement of the land, but the party who furnishes them to be put into the land has no lien for furnishing such material to make the improvement.

In the case at bar, the complainants "improved" the property by putting on it flowers, shrubs, trees, and by grading and probably graveling the grounds and walks, but they made no erections, structures, buildings, fixtures, or machinery, unless the rustic bridge may be classed as such, and there is nothing to show how or out of what it was constructed, and it was plainly but a part of the grading and finishing the walks and drives, and an item of but little importance, as it is not separately priced and enters into other items valued at twelve hundred dollars. If we should hold that a mechanic's lien exists for such work as this and such material and such improvements, we must also hold, ³⁰⁷ as a logical sequence, that the person who, under a contract, fells the forest trees and turns the soil and puts the land in cultivation, and thus permanently improves it, has a lien for such services, and we must also hold that the dealer who furnishes the fertilizer to improve the ground also has a lien, and that the laborer who undertakes to do clearing, ditching, and grubbing has a lien. Indeed, we can draw the line nowhere if it would include anyone who does any labor or furnishes any materials to permanently improve the land at any time. We think the statute refers to erections, structures, fixtures, machinery, and buildings—things constructed upon the land—and not to the enriching of the soil and beautifying the grounds by planting flowers, shrubs, and trees on it. We are of opinion, therefore, that the chancellor and court of chancery appeals were in error in fixing a lien in this case, and their holdings are reversed and the complainants' bill is dismissed at their cost.

In this view of the case it is not necessary to consider the other questions in the case, except to say that we do not think the proceedings in the federal court would prevent or estop complainants from asserting or enforcing their lien, if they had one. They are entitled to their judgment against the company with which they contracted, but must pay all costs.

A STATUTE GIVING A MECHANIC'S LIEN is to be liberally interpreted so as to make the remedial purpose of the legislature effectual: *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925.

MECHANICS' LIENS—WHO ENTITLED TO.—The Minnesota statute does not authorize a mechanic's lien for filling in and grading earth about buildings already erected, where the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land: *Pratt v. Duncan*, 36 Minn. 545, 1 Am. St. Rep. 697. Breaking prairie is not an "improvement upon land" for which a mechanic's lien will lie: *Brown v. Wyman*, 56 Iowa, 452, 41 Am. Rep. 117.

BRADSHAW v. JONES.

[103 TENNESSEE, 331.]

SEDUCTION.—A PROMISE OF MARRIAGE is not necessary in Tennessee in order to constitute seduction; mere solicitation or importunity is sufficient.

SEDUCTION.—TO CONSTITUTE seduction, the consent of the female to the act of intercourse may be induced by any act, representation, or statement of the man, in the absence of which there would be no willingness on the part of the woman; but it is not seduction where the willingness arises out of the sexual desire or curiosity of the female, so that she only needs opportunity for the commission of the act.

EVIDENCE—SEDUCTION.—In an action for seduction, statements made by the woman on the morning following the transaction are competent evidence to sustain her version of the affair, especially when denied by the defendant.

Shields & Mountcastle and S. G. Heiskell, for the appellant.

Templeton & Carlock and I. L. Moore, for the appellee.

332 WILKES, J. The plaintiff, Jones, who is a minor, by her father as next friend, sued the defendant, Bradshaw, for ten thousand dollars damages for seduction. There was a trial before the court and a jury and a verdict for five thousand dollars. A remitter of two thousand seven hundred and fifty dollars was entered, and judgment was rendered for two thou-

sand two hundred and fifty dollars and costs, and defendant has appealed and assigned errors. It is said there is no evidence to support the verdict.

The main contention is that upon the testimony of the plaintiff herself it is not a case of seduction, but simply a case of illicit intercourse, indulged in voluntarily by both parties, and without such promises, inducements, solicitations, or importunity as would make it seduction. It is difficult to draw the line between seduction and mere illicit intercourse which is not actionable. Our cases go as far as any to sustain the action. In *Reed v. Williams*, 5 Sneed, 580, 73 Am. Dec. 157, it was said that it was not necessary for the plaintiff to show that the defendant had used flattery or made false promises to accomplish his purposes, but it would be sufficient if the seduction resulted from the solicitation and importunity of the defendant to indulge in criminal intercourse, in consequence of which she consented. The court said it is enough ³³³ that by any means or acts he tempted or persuaded his victim to the surrender of her chastity. This case is approved in *Franklin v. McCorkle*, 16 Lea, 628, 57 Am. Rep. 244, and the court said: "The cause of action is complete under our law without any promise of marriage, or anything more than solicitation and importunity, to which the female yielded." It is further said in that case that the surrender of chastity is the cause of action; the means by which this is induced is immaterial, except in aggravation of damages.

Both of these cases are referred to in *Graham v. McReynolds*, 90 Tenn. 678, and approved, and the learned special judge in that case says that persuasion alone is sufficient, if yielded to; and the force of the holding is emphasized by the dissent of Lea, judge, that persuasion alone should not be held sufficient: *Graham v. McReynolds*, 90 Tenn. 704. In the later case of *Ferguson v. Moore*, 98 Tenn. 342 et seq., the trial judge charged the jury that in order to constitute seduction it was not indispensable that the man use seductive arts or promises, but any act or promise or deception of the man, by which he overcomes the scruples of the woman and induces her to have unlawful sexual intercourse with him, would constitute the offense. But if the woman, without being deceived and without any false promises, deception, or artifice, voluntarily submits to the connection, the law affords her no remedy, and she cannot recover. The exception ³³⁴ was made by the defendant, and it was insisted the law was too strongly

stated against him but it was said to be not erroneous, but a plain, simple statement of the law that any jury could understand and not misconstrue. It was a case where it was claimed there were promises of marriage made to accomplish the act.

We cannot hold that consent or willingness upon the part of the female to the act of intercourse will prevent its being a case of seduction; on the contrary, the willingness of the female is one of the essential elements of seduction, and is the feature which, more than all others, distinguishes seduction from rape. The crucial question in the case is: Does the willingness arise out of the sexual desire or curiosity of the female, so that she only needs opportunity for the commission of the act, or is that willingness induced by some act, representation, or statement of the man, in the absence of which there would be no willingness upon the part of the woman? In the latter case there is seduction; in the former there is not. The courts have never defined what acts would be sufficient, nor how pressing should be the importunities, nor how often repeated the solicitations to make the case one of seduction. It would be impossible to formulate any state of facts that would be required. It will be seen, however, from our decisions, that any act, solicitation, or statement which overcomes the unwillingness ³³⁵ of the woman and causes her to yield her virtue is sufficient.

It appears that the girl in this case was nineteen years of age. She was employed in the defendant's family as a domestic. Defendant's wife left home for a visit to Knoxville, leaving her husband and the girl alone in the residence, which was a farmhouse in the country. He appears to have been a man of standing and influence in the community where he lived. Her statement of the transaction is that she and the defendant were sitting by the fire. He was, as she states, threading up his shoes to come to Knoxville the next morning, and when through with that moved over on the other side of the lamp to read. After a little while he threw the book down, moved over by the plaintiff's side, commenced picking at her, and asked her if she would not like to be married and have an old man to sleep with on cold nights. She replied that she did not care anything about it. He asked her if she would not sleep with him, and she told him no, that she did not want to. He then asked her to sleep with him, just to please him, and she replied she would not. He thereupon pulled her

upon his lap and kept her there for a while, put his hand under her dress, and asked her again if she was going to sleep with him, and she replied, "No," and he said "she would." He put her down and got ready for bed. He previously had off all his ³³⁶ outer clothing but his pants. She picked up the lamp and started out of the room. He caught her. She said "she was going," and he replied "she was not," blew out the light, took her up and put her on the bed in her clothing, and got into it, and the act was at once consummated, and was repeated that night; that he said nothing after getting in bed, but at some time in the interview told her that he could not beget a baby. He had never said anything to her previous to this occasion, and whether anything further was done after that night is left in some doubt under the record. It is stated the girl remained at the house for two nights, but not definitely that further intercourse was had.

We must look to all the circumstances to reach the true merits of the controverted question. Under the finding of the jury we must conclude that at this time she was virtuous, otherwise in no event could they have given a verdict. The trial judge so expressly and correctly charged. Now the defendant was a man about forty-four years of age. He had been married some four or five years, and his wife had borne him no children. The girl was in his employ, a hireling. She was alone with him in a farmhouse. She is, as appears by the record, an uneducated country girl. She shows by her refusals when asked that she was not originally willing to consent; but when she was caught and the defendant manifested his purpose to have intercourse ³³⁷ with her, she made no physical resistance and uttered no outcry. It may be, and probably did present itself to her, that resistance and outcry would be useless. While a girl of more refinement and more education and a keener sense of the dignity of her womanhood would have resisted and would have screamed and would not have submitted, except to overpowering force, she may have thought that such a course would be useless and perhaps endanger her life, while a quiet submission would result in no great injury. In this respect he may have deceived her by saying he could not beget a baby, and she may have entertained such a belief from this assurance of his and from the fact that he had no children, although he had been married for several years, and hence her fears were lulled and quieted.

We are of opinion, therefore, that under all these circumstances the defendant accomplished his purpose by his importunities, deception, actions, and assurances, and while they were not such as would usually prevail, they were sufficient in this instance. His assurance to her of his impotency was designed by him to lull her fears and apprehensions and induce her to submit. This, with his other acts, was sufficient under our cases to make out seduction. We do not pass upon the sufficiency of the evidence. It is conceded there is enough to sustain the verdict under the rule. ³³⁸ Some exceptions are made to the testimony. They are general and we think not well made. Her statements made on the next morning after the transaction are competent to sustain her version of the affair, especially when it was vigorously assailed and stoutly disputed and denied by him. Indeed, we cannot see that they added to the strength of her case, but to the contrary, and the error, if one, was immaterial, not hurtful.

The verdict as rendered below is not excessive, and it is affirmed with costs.

What is Seduction.*

Seduction may be both a civil injury and a crime. As a civil injury it can be defined generally as the act of a man in inducing a woman to commit unlawful sexual intercourse with him. As a crime, it is defined as the act of a man in enticing a woman of previous chaste character, by means of a promise of marriage or other persuasion, promises, or arts of deception, to have sexual intercourse with him. It is impossible to give a general definition of seduction as a crime or as a civil injury that will cover all cases. This is true of seduction as a crime, because such seduction is a creature of statute and the elements necessary to constitute the offense vary in different jurisdictions. With respect to seduction as a civil offense, the common law furnished a remedy, permitting a civil action by a parent or master for the seduction of his daughter or servant. This common-law action has, however, been changed and enlarged by statute, so that the elements which go to make up the civil injury are not the same in all the states. It will be necessary, therefore, to treat separately of seduction as a civil injury and as a crime.

Civil Injury—Foundation of Action.—At common law the legal foundation of the parent's right of action for the seduction of his daughter was the loss of service. The suit by the father was based upon his right as a master to the services of his daughter, and in

*REFERENCE TO MONOGRAPHIC NOTES.

The crime of seduction as defined in the American statutes: 8 Am. St. Rep. 870-872. Seduction as a criminal offense: 87 Am. Dec. 405-411.

Civil action for seduction: 44 Am. Dec. 162-179; 4 Am. Dec. 403-407.

no sense upon his right as a father to secure redress for the injury to his family: *Hornketh v. Barr*, 8 Serg. & R. 36, 11 Am. Dec. 568; *Mercer v. Walmsley*, 5 Har. & J. 27, 9 Am. Dec. 486; *Emery v. Gowen*, 4 Greenl. 33, 16 Am. Dec. 233; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *White v. Nellis*, 31 N. Y. 406, 88 Am. Dec. 282; *Nickleson v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318. The loss of service was, however, a minor element in estimating the damage which the father had suffered. As a consequence, the loss of service came to be regarded as scarcely more than a peg upon which to hang the damages which might be subsequently awarded. Any service, however slight, was sufficient: *Boyd v. Byrd*, 8 Blackf. 113, 44 Am. Dec. 740; *Emery v. Gowen*, 4 Greenl. 33, 16 Am. Dec. 233; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767; *Vossel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Beaudette v. Gagne*, 87 Me. 534. Actual service was not necessary. Proof of constructive service satisfied the rule, which was treated more as a legal fiction than anything else: *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288. The merely nominal relation of master and servant is all that is required to give the father a footing in court: *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. Rep. 52. This case states clearly the basis of the action: "The common law regarded the father's action for the seduction of his daughter as an action of trespass for assaulting his servant, whereby he lost her services. It was based upon the relation of master and servant, and not upon that of parent and child. . . . No action could be maintained by the father for the injury in his parental capacity; but in the struggle between substantial justice to the parent and the precedents in actions for seduction, the courts in England and America have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation of master, and permitting a recovery in his relation of parent. The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action, but it is now little more than a legal fiction, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family." The legal right of a father at the time of the seduction to command the services of his child is sufficient: *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Ingwaldson v. Skrioseth*, 7 N. Dak. 388. The fact that a daughter is under the age of twenty-one years, and that the father was legally entitled to her services, is held to be conclusive that the relation of master and servant exists, and the father can maintain an action to recover for her seduction, notwithstanding she was in the actual service of another: *Hudkins v. Haskins*, 22 W. Va. 645; *Riddle v. McGinnis*, 22 W. Va. 253; *Midleton v. Nichols*, 62 N. J. L. 636.

The old idea of loss of services, which lay at the foundation of an

action for seduction, has given way to the more enlightened and refined views of the social relation: *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392. In many of the states statutes have been passed which make the gist of the action the seduction and not the loss of service. See, for example, the California Code of Civil Procedure, section 375. And in some states the adoption of the reformed procedure has been held to work the same change, so that the averment and proof of loss of service are unnecessary. Thus, in Kansas, where the code has abolished all fictions in pleading, and where the complaint is required to state the facts constituting the cause of action in ordinary and concise language, it is held that "if the necessity ever existed for cloaking the real cause of action under the nominal disguise of another one, it no longer exists, and we hold accordingly. In this state, a parent may maintain an action for the seduction of the daughter without the averment or proof of loss of services or expenses of sickness": *Anthony v. Norton*, 60 Kan. 341, 72 Am. St. Rep. 360. Whatever changes may have been wrought by statute in the nature of the civil action for seduction, there can be no question but the original idea of service upon which it was based has left such an imprint upon it as to have effectually molded the general character of the action even in its modern form. It is because the elements which constitute seduction as a civil offense are in part the result of this idea of loss of service, that rendered it necessary to examine the foundations upon which the civil action originally rested.

Civil Action by Parent—Seduction.—The common law afforded the woman who had been seduced no remedy in her own name. The action must be brought by the parent—usually the father. When the action is by the parent, what acts on the part of the man are sufficient to constitute seduction? It may be said, to begin with, that a father may maintain an action upon a state of facts which would under no circumstances sustain a criminal prosecution. Strict seductive arts are not required in order that he shall recover for his injury. And here we see the influence of the idea that the master has been deprived of the service of his servant, and, in consequence, should be permitted to recover for such loss, notwithstanding no seductive arts were used and the woman was equally to blame. Consent on the part of the woman is no defense either to a civil action or to a criminal prosecution, since consent is always obtained or it is not seduction. But as applied to an action by the father, even a willing consent does not defeat his right of action. So far as the rights of the father are concerned she cannot consent: *Barbour v. Stephenson*, 32 Fed. Rep. 66. As was said in *McAulay v. Birkhead*, 13 Ired. 28, 55 Am. Dec. 427: "Whatever bearing the forward and indelicate conduct of the plaintiff's daughter ought to have had on the question of damages, it certainly had none on the question of his right of action. In respect to him she had no right to consent, and her act in assenting, or even procuring, the criminal

connection was a nullity; so the defendant must stand as a wrongdoer, from whose act the plaintiff has suffered damage." Mere proof of sexual intercourse without any seduction will give the father a right of action to recover for any actual loss he may have suffered in his capacity as a master: *Hogan v. Cregan*, 6 Rob. (N. Y.) 138; *Leucker v. Steileu*, 89 Ill. 545, 31 Am. Rep. 104. But there must be some sickness which follows as a result of the sexual intercourse or the father does not suffer a loss of service which entitles him to maintain the action: *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Leucker v. Steileu*, 89 Ill. 545, 31 Am. Rep. 104. There is an intimation in some of the cases that real, technical seduction must exist before the father is entitled to sue. But this is certainly not the rule where the action is based upon a loss of service in his capacity of master. The utmost effect that can be given to such willingness on the part of the woman to the intercourse, as applied to the action by the father, is to mitigate the amount of damages he is entitled to recover. The loss of service would be the same to the parent whether the intercourse was occasioned by her misconduct or not. The expense and trouble incident to her confinement would be the same as if she had been actually seduced. But it has been held that the recovery of the father is limited to such actual loss: *Comer v. Taylor*, 82 Mo. 341. The damages would not, in such a case, be aggravated on the ground of seduction: *Hill v. Wilson*, 8 Blackf. 123. In such a case it is said that the maxim "*Volenti non fit injuria*" is applicable, and correctly expresses the law: *Comer v. Taylor*, 82 Mo. 341. While the rule is general that in the absence of actual seduction on the part of the man, the damages cannot be so great, yet there is a well-defined tendency to permit the father to recover something for the ignominy which is cast upon him and his family simply by the fact that his daughter has fallen, though it may have been by her own fault. This was well expressed in *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. Rep. 52: "The cases holding that criminal connection without seduction cannot be the basis of the father's action appear to be based upon a false analogy. They seem to confound the statutory right conferred in some states upon the female for the redress of her own grievance against her seducer with the father's common-law action for the injury which he sustains. In the statutory suit by the girl, as in the criminal prosecution for the offense, there must be proof of seduction in its technical signification: *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17. But the father's action is independent of the daughter's, and is based upon a different injury. When the ignominy which is heaped upon him is the measure of damages, the daughter's willingness does not excuse the defendant, for without his act the father had not been injured. It is not a case for the application of the maxim, *Volenti non fit injuria*, unless the father himself is at fault, as by connivance at the act." Even in those states where statute has abolished the common-law fiction of service upon which the action

was originally based, willing consent on the part of the daughter does not defeat the action by the father, though it is a circumstance which may be shown to mitigate the damages. The old idea of loss of service is thus seen to have its influence upon the modern cases even where it has been changed by statute, and real seduction is not essential to sustain the father's right of action. *Stoudt v. Shepherd*, 73 Mich. 588, is illustrative of this. Here the court said that, "of course, a father is not so much injured by the misconduct of a naturally bad girl as by that of a good one, and a person who has illicit dealings for the first time with a girl already depraved, and is not the cause of her fall, does not accomplish the same degree of wrong as in other cases. But there is no rule which holds legally free from accountability to some extent any person who interferes with the peace of a household by indulging in wrong conduct with one of its minor inmates, even if she is a participant in the wrong. The scandal and the suffering may be great, even in such a case, and the home of the wayward girl is at least some restraint upon her if she is let alone. Each case must be judged by its own facts. But a father who has not himself encouraged or aided in what has led to the dishonor of his daughter cannot be held entitled to no redress. An abandoned girl who is herself the active seducer of a young person stands in a very different condition."

As is apparent, these decisions are based upon the doctrine that the father should be allowed to recover for the dishonor to himself and his family, and the special circumstances surrounding the debauchment of his daughter are not material to the father's cause of action except as to the amount of recovery. "The circumstances under which she was debauched," said the court in *Hein v. Holridge* (Minn., 1900), 81 N. W. Rep. 522, "may aggravate or mitigate the damages to be awarded; but they do not afford any basis for limiting, as a matter of law, the father's damages to his actual money loss."

It is doubtful whether this rule has general support, however, and where the sexual intercourse is caused as much by the fault of the woman as of the man, the damages of the father are limited to the actual pecuniary loss. It is clear, however, that the use of seductive arts, sufficient to make the offense criminal seduction, is not required; solicitation, importunity, or any means may be used, and the offense is seduction for which the father may recover in his capacity as parent: *Reed v. Williams*, 5 Sneed, 580, 73 Am. Dec. 157.

In Oregon, it seems that the statute has completely changed the character of the civil action. The action is now allowed for seduction as such, and if there has been no seduction the father has no remedy, notwithstanding there may have been intercourse and resulting illness. Something more is necessary than mere sexual intercourse, induced by persuasion or urgent importunities. The woman must have been deceived and deluded: See *Patterson v. Hayden*, 17 Or. 238, 11 Am. St. Rep. 822. So that in that state seduc-

tion as a civil and as a criminal offense are very similar, more so than elsewhere.

Sexual intercourse accomplished by force is such seduction as will sustain a civil action. The presence of force does not alter the character of the injury which has been done to the father and to the family. The gist of the action is the debauching of the daughter, and it is immaterial whether the intercourse was accomplished by force or fraud: *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Russell v. Chambers*, 31 Minn. 54; *Lawrence v. Spence*, 90 N. Y. 669; *Milliken v. Long*, 188 Pa. St. 411. That the offense is rape instead of seduction will not defeat the civil action, though it would the criminal prosecution: *Furman v. Applegate*, 23 N. J. L. 28; *Damon v. Moore*, 5 Lans. 454.

Civil Action by Parent—Previous Chastity.—Upon the same theory that the father can recover notwithstanding the consent of his daughter to the seduction, so can he maintain an action even though his daughter may not have been chaste at the time of the alleged seduction. Mere prior unchastity does not of itself defeat the father's action. The value of the daughter's character enters into the question so far as the amount of damages are concerned. The pain to the father and the disgrace to the family vary according as the daughter is chaste or profligate. If the daughter is notoriously profligate the alleged seduction can have caused no additional disgrace to the family, and the father can, in consequence, recover nothing as a parent, and is limited in his recovery to the loss suffered in his capacity of master. If she is not notoriously profligate, yet has been guilty of specific acts of unchastity, the effect will be to mitigate the damages only. "To whatever extent the defendant's act has contributed to the girl's downward tendency, to that extent he has injured the parent, and must respond to him in damages": *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. Rep. 52. This is undoubtedly the correct rule, that prior unchastity goes only to mitigate the damages, and not defeat the action. Previous chastity is therefore not an essential element in seduction as a civil wrong: See *Milliken v. Long*, 188 Pa. St. 411; *Stoudt v. Shepherd*, 73 Mich. 588. Oregon seems to furnish an exception to this rule, the statute in that state so changing the character of the common-law action for seduction that prior acts of unchastity will not merely mitigate the amount of damages which may be recovered, but will defeat the action entirely. In *Patterson v. Hayden*, 17 Or. 238, 11 Am. St. Rep. 822, it was held that a woman who was guilty of lewd practices immediately before the alleged seduction, who engaged in criminal indulgence with her male acquaintances as opportunities presented themselves, and who made opportunities for that purpose, cannot be said to be drawn aside from the path of virtue and overreached by the artifice, deception, and cunning of the seducer, and hence is not seduced within the meaning of the statute. In *Hoffman v. Kemerer*,

44 Pa. St. 452, the right of the father to recover damages is said to be based upon the disgrace brought upon the family by the stain upon the reputation of the daughter. If the daughter's reputation is good he may recover damages for the disgrace, notwithstanding she may have been guilty of other acts of indiscretion. The court intimated that there was no danger of a person having a better reputation in ordinary conduct than he deserved. Outside of a few jurisdictions the question of mere reputation, as distinguished from character, is of little importance except as it may affect the amount of damages. In an early case in Tennessee, *Lea v. Henderson*, 1 Cold. 145, the court laid down the rule that if the reputation of the daughter was good, and if other acts of sexual intercourse of which she had been guilty with other men were unknown to the defendant and to the public, such acts could not be shown in mitigation of damages. The theory of this case was that the guilt of the defendant, who was ignorant of the daughter's unchastity, was as great as if she had always been chaste, since her prior unchastity could have had no influence upon his motives or conduct, and the injury and disgrace to the parent and to the family was as great as it would have been had the daughter been pure, since the family had suffered no disgrace by her previous indiscretions because they were unknown to them and to the public. Such holding was clearly unsound, because the injury to a parent whose daughter is already impure cannot be as great as when his daughter is virtuous. The case was rightly overruled by *Love v. Masoner*, 6 Baxt. 24, 32 Am. Rep. 522, where the court said: "Can it be said that the injury to a parent whose really virtuous daughter has been overcome and debauched by the appliances of the seducer is not greater than the seduction of one who had already lost the jewel of chastity? The fact that she was not virtuous when last seduced connects itself directly with the injury complained of, as a circumstance in mitigation of the damages. The circumstance that the defendant and the public were ignorant of her former derelictions cannot alter the fact that she had ceased to be a virtuous woman. The damages are to be governed by the real injury, and not by the estimate placed by a deluded parent upon the character of a daughter whom he regarded as virtuous, but who had only maintained the appearance of virtue by concealing her unchastity from her parents and the public." This is the correct rule, and the real character of the daughter may be inquired into for the purpose of mitigating the damages.

So far, then, as an action by a parent to recover for the seduction of his daughter is concerned, seduction may be defined as the act of a man in inducing a woman to commit unlawful sexual intercourse with him. Technical seduction by the use of seductive arts is not required, any persuasion being sufficient, and even the use of force, so as to make the offense rape instead of criminal seduction, will not defeat the action; and in many jurisdictions the mere act of sexual intercourse for which the woman is as much to blame as the man,

is sufficient to sustain the action by the father, though a willing consent on the part of the woman will mitigate the amount of damages which can be recovered. Previous chaste character on the part of the woman is not necessary to enable the father to sue, though the proof of unchastity will go in mitigation of the damages.

Civil Action by Woman—Seductive Arts.—At common law, a woman could not sue for her own seduction. But under the statutes of most of the states a woman is now given a right of action for her own seduction. In suits of this character the question arises whether there must be proof of real seduction in order to sustain the action, or whether the proof is of the same character as that required in a civil action by the father. The correct rule undoubtedly is that a woman must prove seduction in its technical signification: *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. Rep. 52. The daughter's action is independent of the father's and is based upon a different injury, and the elements constituting the offense toward the woman are not necessarily the same as those in the civil injury to the father. By technical seduction, as we have used it here, is meant the use of flattery, promises, or other artifices by the defendant, by means of which the sexual intercourse was secured. We do not include the element of previous chastity, which will be considered under that head. Mere illicit intercourse between the plaintiff and the defendant is not such seduction as permits the woman to sue: *Delvee v. Boardman*, 20 Iowa, 446. The woman must show that the intercourse was accomplished by some promise or artifice, or that she had been induced to yield her virtue by flattery or deception. If she voluntarily submitted to the sexual embrace without being deceived, and without any false promise or artifice, she has no remedy: *Brown v. Kingsley*, 38 Iowa, 220. No satisfactory standard has been adopted for determining what arts and promises are sufficient to constitute seduction. Each case must stand upon its own facts. No particular arts or promises will, as a matter of law, constitute the offense so as to allow the woman to sue: See *Hopkins v. Mathias*, 66 Iowa, 333. It is generally a question for the jury to determine under proper instruction from the court. It has been said that the man need not use seductive arts, but that "any act or promise or deception of the man by which he overcomes the scruples of the woman and induces her to have sexual intercourse with him would constitute the offense": *Ferguson v. Moore*, 98 Tenn. 342. The consent of the woman constitutes no bar to the action, if the consent was obtained by the use of deception and false promises: *Stoudt v. Shepherd*, 73 Mich. 588. Any influence and persuasion which is intended to, and does effectually accomplish the result of securing the sexual intercourse is sufficient, though the cases will vary greatly as to what persuasion is sufficient. In *Egan v. Murray*, 80 Iowa, 180, the evidence showed that the defendant had made no express promise of marriage to the woman, neither had he in words lied to or deceived her, yet he conducted himself toward her as

her acknowledged suitor for a long time so as to win her love, and get her into his power, and led her to the reasonable inference that he intended to marry her, and by these means obtained sexual intercourse with her, and it was held that the jury were justified in finding him guilty of seduction. The artifice, deceit, or promises used must be such as are calculated to mislead a virtuous woman, and she must have been actually misled by them. Mere reluctance on the woman's part is wholly insufficient. "It should be a reluctance that enticements and persuasions could not overcome without the presence of some other potent influence; such a state of facts should be proved as would convince a fair-minded person that she had been deceived and deluded, and that her submission was in consequence of such deception and delusion. . . . If a woman of mature years is allowed to recover damages for the loss of reputation and character in consequence of her having permitted a man to have carnal knowledge of her, she should be required to show that she had been prudent; had exercised at least ordinary discretion; had sacrificed her virtue through an influence that was calculated to lead astray an honest-minded female": *Breon v. Henkle*, 14 Or. 494. The facts in this case were such that the court expressed its want of faith in the merits of the law permitting a woman to sue for her own seduction, without requiring her to prove something more than mere importunity as the means employed to accomplish the seduction. The court said that the notion that the modern woman is the weaker sex "is only entertained by the credulous and unsophisticated. They are not easily beguiled, and should be held to a reasonable responsibility." Some of the cases unfortunately indicate that the law permitting a woman to sue for her own seduction is taken advantage of by adventuresses for the purpose of profit, and consequently there would seem to be no hardship in requiring a strict proof of seduction by such enticements and persuasions as would be likely to mislead a virtuous woman: See *Patterson v. Hayden*, 17 Or. 238, 11 Am. St. Rep. 822. But, as said before, each case must stand by itself. What would be sufficient artifice to overcome the scruples of a young and innocent girl, might be wholly inadequate in the case of a mature woman of experience. So in *Hawn v. Banghart*, 76 Iowa, 683, 14 Am. St. Rep. 261, where a married man forty-two years old had sexual intercourse with his domestic, a girl fifteen years of age, after continuous daily love-making for some months, it was held that if the means made use of by the man were calculated to overcome the will of a girl of her years and experience and were intended to create in her mind an affection for him, and did have that effect, and if under that influence she yielded her person to him, this amounted to an "artifice" within the meaning of the law. And in *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. Rep. 144, it was held that seduction was sufficiently established by the evidence, where it was shown that the plaintiff was a chaste girl of sixteen

years of age, making her living far distant from her few friends, stopping at night alone in a cottage; that she was visited after dark by the defendant, her employer, a man of wealth and mature years, with whom she was on friendly terms; that after a conversation upon ordinary topics, lasting some time, he gave her a glass of wine, by the drinking of which her mind was seriously affected; that he expressed affection for her, repeatedly caressed her, made promises of future friendship and assistance; and that, after all these things had been going on some length of time, he debauched her. The definition of seduction as found in this case we believe to be correct, as applied to an action by the woman to recover damages. The court said: "The word 'seduction,' when applied to the conduct of a man toward a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity, based on professions of attachment, or the like, for the woman, and that, relying solely on said promises or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer."

In a civil action by the woman for her seduction it is wholly immaterial that there should be a promise of marriage: *Milliken v. Long*, 188 Pa. St. 411; *Hallock v. Kinney*, 91 Mich. 57, 30 Am. St. Rep. 462; *Gemmill v. Brown* (Ind. App., 1900), 56 N. E. Rep. 691. "A promise of marriage is one of the means often resorted to by the seducer to accomplish his purposes, but such promise is by no means a necessary element in seduction": *Ireland v. Emerson*, 93 Ind. 1, 47 Am. Rep. 364. A promise of marriage conditioned upon the begetting of a child is sufficient influence and persuasion as will amount to seduction: *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567. A married man may be guilty of seduction, and the injury is complete, even though the female knows that her seducer is a married man: *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. Rep. 144. The fact that the intercourse was accomplished by force does not, it seems, prevent the offense from being such seduction that a civil action can be maintained by the woman to recover for the injury which she has thereby sustained: *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. Rep. 144.

Civil Action by Woman—Previous Chastity.—A woman may be seduced, so that she may maintain a civil action to recover damages for the injury to her, and at the same time not be of chaste character. In other words, previous chaste character, which we shall see is essential to constitute the crime of seduction, is not an essential element of the civil offense against the woman. Of course, if a woman has been unchaste and has reformed, and at the time of her seduction is leading a virtuous life, there is no doubt that a civil

action will lie: *Gemmill v. Brown* (Ind. App., 1900), 56 N. E. Rep. 691; *Patterson v. Hayden*, 17 Or. 238, 11 Am. St. Rep. 822. But the authorities go further than this and hold that a woman of previous unchaste character may recover for her own seduction, though her character before seduction may be shown in mitigation of damages: *Gemmill v. Brown* (Ind. App., 1900), 56 N. E. Rep. 691; *Love v. Masoner*, 6 Baxt. 24, 32 Am. Rep. 522. See, also, *Stoudt v. Shepherd*, 73 Mich. 588. This question was very carefully considered in *Smith v. Milburn*, 17 Iowa, 30, and the conclusion reached that an unmarried female of previously unchaste character could sue for her own seduction; that previous chaste character was not essential to the maintenance of the action, but that such character could be shown in mitigation of damages. The court, in this case, said: "If she has before yielded to the embraces of other men, does she thereby, so far as this action is concerned, become an outlaw, and will the courts in this form deny her all damages? . . . Can it be said to follow as a legitimate legal conclusion, that because she may no longer be actually chaste, she is therefore presumed to yield to the embrace of the party charged voluntarily and without the use of any of those arts necessary to give the right of action? Or, still again, is a female having such a moral or social status subject to the wiles and arts of every rake in the land, and to be denied all remedy? . . . Suppose the jury believe that in the particular case the proof establishes not a mere illicit connection, but seduction, within the meaning of the law; while thereby she may not suffer in character, and for the loss thereof, therefore, may not be entitled to recover, why should not the defendant respond for the other consequences of the wrong? The answer to this, perhaps, is that such a woman cannot be said to be seduced; that she has already left the path of virtue and chastity, and the defendant did not seduce or lead her from it. This may be true as far as relates to character, but is it necessarily true as to the particular act or wrong concerned? In such a case, defendant has not the means of injuring her character. He does not meet her chaste, and leave her polluted and ruined, but the facts may show that she only yielded after the most persistent and long-continued artifices and deceitful influences. And it is no sufficient answer to say that this is improbable, or, indeed, almost impossible. It is the fact that is to be inquired into; it is the fact of seduction that the jury are to determine. . . . In an action by the father, the character of the daughter, the seduction being established, only affects the question of damages, and though unchaste, will not defeat the action. And the thought is certainly just and pertinent that the same rule should apply when the action is brought by her for her own seduction." The woman's character being in issue for the purpose of mitigating the damages, evidence of improper conversations and associations with men prior to the alleged seduction is admissible: *West v. Druff*, 55 Iowa, 335.

In conclusion, then, seduction as a civil injury against the woman

herself may be defined as the act of a man in inducing a woman, by means of persuasion, promises, or arts of deception, to commit unlawful sexual intercourse with him. Technical seduction, by the use of such persuasion and promises as are calculated to induce a virtuous woman to yield to the sexual embrace, is requisite, though the use of force to accomplish the seduction is no defense, even if it would have such a result upon the criminal prosecution. Previous chaste character is not an essential element, though the proof of unchastity prior to the seduction will serve to lessen the amount of damages which can be recovered.

Seduction as a Crime—Use of Seductive Arts.—Seduction seems not to have been a crime at common law, but it is made such by statute probably in all of the states. The elements which constitute the offense vary somewhat in the different jurisdictions. But they may be grouped under three general heads, and the crime defined thus: 1. The act of a man in inducing a woman of previous chaste character, by means of persuasion, promises, or arts of deception, to have unlawful sexual intercourse with him; 2. The act of a man in inducing a woman of previous chaste character by a promise of marriage to have unlawful sexual intercourse with him; 3. The act of a man in inducing a woman of previous chaste character, by a promise of marriage and some other inducement, to have unlawful sexual intercourse with him.

Where not made so by statute, a promise of marriage is not essential to constitute the crime. The offense is equally criminal if it is accomplished by means of temptation, deception, and arts and acts of flattery: *Bracken v. State*, 111 Ala. 68, 56 Am. St. Rep. 23. Mere sexual intercourse is not seduction, but to secure such intercourse the man must have made use of insinuating arts to overcome the opposition of the woman, and must, by wiles and persuasion, without force, have debauched her: *People v. Gumaer*, 4 N. Y. App. Div. 412. The art, influence, promise, or deception must be such as is calculated to accomplish the object, and which does secure the yielding of the woman's person to the man: *Putnam v. State*, 29 Tex. App. 454, 25 Am. St. Rep. 738; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Bierce*, 27 Conn. 319. "There is no legal standard by which to determine what false promises, artifices, and deception are sufficient to constitute the crime of seduction. Of course, mere unlawful commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person to the accused. What would be sufficient to overpower the mind of one woman would be insufficient to lead away another of more mature mind and discretion": *State v. Fitzgerald*, 63 Iowa, 268. Each case must depend upon its own facts and circumstances. The condition of life, advantages, age, and intelligence of the parties are important elements to be considered. Hence where a young man of eighteen was paying his addresses to an unsophisticated country girl of less

than fourteen years of age, frequently staying up with her until midnight, and told her there was no harm in having illicit intercourse, and that nearly everybody did it, the court held that a conviction for seduction was proper: *State v. Higdon*, 32 Iowa, 262. Seduction may be accomplished by the use of deception, temptation, or arts of flattery: *Smith v. State*, 107 Ala. 139. In defining these terms the court in *Suther v. State*, 118 Ala. 88, sustained a charge to the jury which instructed them that: "Deception is the act of deceiving, the intentional misleading of another by a falsehood spoken or acted. Temptation is that which tempts to evil; an evil enticement or allurement. Flattery is an effort to influence another by use of false or excessive praise, insincere, complimentary language or conduct. Art is the skillful and systematic arrangement or adaptation of means for the attainment of some desired end." The inducements or promises or artifice used to accomplish the intercourse must be in the nature of a deception. The woman must be in some way deceived by the man, and induced by such deception to part with her virtue and yield to the embraces of her deceiver: *State v. Hamaun*, 109 Iowa, 646. This deception may be accomplished in a variety of ways and by the employment of various means. In *State v. Fitzgerald*, 63 Iowa, 268, it was held to be such artifice and deception as would amount to seduction for a man fifty years old to have intercourse with a girl of twelve by promising to give her presents if she would consent to the act, and by telling her that the act was not wrong and would not hurt or injure her. Similarly in *State v. Hemm*, 82 Iowa, 609, where the man represented that there was nothing wrong in the act and that no one would ever find it out, it was held to be such artifice and fraud as would support a conviction for seduction. If the woman yielded because of his representations, there was deception, since he was the means of her public exposure. And in *State v. Hayes*, 105 Iowa, 82, a conviction for seduction was sustained where the defendant was a man thirty-five years old, and the girl was only seventeen, and the evidence showed that he was on very friendly terms with the girl, that she was intimate with his family, and that at the time of the alleged seduction he put his arm around her and began to coax and flatter, and told her that it would not hurt her to have intercourse with him. In *Powell v. State* (Miss., 1896), 20 So. Rep. 4, the defendant was the uncle of the girl seduced, who was fifteen years old and lived in his family. He had been coming to the girl's bed at night two or three times a week for several weeks, taking hold of her, persuading her, and saying that he would not hurt or ruin her. Under such circumstances the court said that "if, at last, corrupted in thought, enfeebled in purpose, and her sexual desires aroused by the defendant's agency, she surrendered to gratify her seducer's desires and her own, thus inflamed, she is not to be placed in line with lost women who sin simply to gratify their animal passions."

In theory, the general rule undoubtedly is that the arts and promises, by the use of which the sexual intercourse is accomplished, must be in the nature of a deception, and be of such a character as are calculated to deceive the mind of a virtuous woman. But it must be admitted that in practice a jury is disposed to find a man guilty of using seductive arts from very slight evidence, and the cases frequently illustrate that the mind of a virtuous woman is most easily deceived. We shall notice this further in subsequent cases. Where the intercourse is induced simply by the mutual desire of the parties to gratify a lustful passion, the act does not constitute seduction: *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863; *Keller v. State*, 102 Ga. 506. Neither is it seduction to have unlawful sexual intercourse for a consideration paid: *State v. Fitzgerald*, 63 Iowa. 268; *People v. Clark*, 33 Mich. 112. In some states the statute requires that the female shall be under a certain age: See *State v. Cougot* (Mo., 1894), 26 S. W. Rep. 566; *Dinkey v. Commonwealth*, 17 Pa. St. 126, 55 Am. Dec. 542.

Unlike the civil injury, the use of force will prevent the act from being criminal seduction. While the offense may be rape, consent on the part of the female is vital to constitute the crime of seduction: *State v. Lewis*, 48 Iowa, 578, 30 Am. Rep. 407; *State v. Kingsley*, 39 Iowa, 439; *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863; *People v. Royal*, 53 Cal. 62; *Croghan v. State*, 22 Wis. 444. There may be statutory offenses which, strictly speaking, are neither rape nor seduction, and in proving such offenses it is immaterial whether the act of intercourse is shown to have been accomplished by force or by means of seductive arts: See *State v. Knock*, 142 Mo. 515. These cases are outside the scope of this note.

Crime—Promise of Marriage.—The statutes of most of the states require that the seduction shall have been accomplished under a promise of marriage in order to constitute a crime. It is very doubtful whether a promise of marriage which is nothing more than a mere form is sufficient. There may be cases that seem to indicate that this might be sufficient: See *State v. Abrisch*, 41 Minn. 41. But a simple blunt offer of marriage is wholly inadequate as a general rule: *People v. Clark*, 33 Mich. 112. Such an offer is little more than a plain business proposition. "It smacks too much of bargain and banter, and not enough of betrayal," said the court in *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349. "This is hire, or salary, not seduction." The promise of marriage must be in the nature of a deceit: *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372; *People v. Clark*, 33 Mich. 112. The promise of marriage must have been the inducement to the intercourse: *Phillips v. State*, 108 Ind. 406. The promise of marriage must sustain the relation to the accomplished purpose of cause to effect: *Carney v. State*, 79 Ala. 14. The woman must have relied on the promise, and have submitted her person to

the man because the promise was made: *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372. The promise must have been such an inducing cause as, without it, the woman would never have yielded: *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863; *Putnam v. State*, 29 Tex. App. 454, 25 Am. St. Rep. 738. In *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, it was held sufficient to constitute seduction under the statute where the accused promised to marry the woman if she would have sexual intercourse with him, "and she, believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection." In line with this is *Callahan v. State*, 63 Ind. 193, 30 Am. Rep. 211. The gist of the offense is the promise to marry the woman and the yielding by her of her virtue in consequence of such promise: *McCullar v. State*, 36 Tex. Cr. Rep. 213, 61 Am. St. Rep. 847. Where the statute requires nothing more than a promise of marriage, it seems that mere proof of such a promise upon which the woman actually relied is sufficient, and this even though the promise was made by the man as a pice of "devilment": *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613. There has, however, been intimation in some of the cases that there must have been the use of seductive arts, calculated to draw the woman aside from the path of virtue, in connection with the promise of marriage. In *Spenrath v. State* (Tex. Cr. App. 1898), 48 S. W. Rep. 192, it was held that a mere general promise of marriage made each time the intercourse took place was not sufficient to constitute seduction. This case approves the rule laid down by the Missouri supreme court, in *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, under a statute which makes one guilty if he "shall, under promise of marriage, seduce and debauch any unmarried female of good repute." The court established the rule that the offense was not complete by the mere having of intercourse, or debauching, under promise of marriage, but that the woman must have been actually seduced, that is, corrupted, deceived, and drawn aside from the path of virtue. There is no seduction if the man, without the use of any such arts and wiles as are calculated to operate upon a virtuous female, and to lead her astray, makes the woman a plain business offer to marry her if she would permit him to have sexual intercourse with her, and she did so on the faith of that promise. Said the court: "No one can, with any degree of plausibility, contend that a virtuous female could be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex." The language of this case has been somewhat limited in its scope by later cases, and while it is still authority for the rule that the acceptance of a mere offer of marriage, without more, in exchange for sexual favors, so that it amounts to a mere bargain, is not seduction, yet the crime may be committed by a man making a promise of marriage, and then by using such promise as a means,

seducing and debauching the woman: See *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372; *State v. Marshall*, 137 Mo. 463. There may be a promise of marriage accompanied by sexual intercourse without seduction, especially where a woman has lost her virtue, and the promise of marriage only induced a change of lovers: *Mrous v. State*, 31 Tex. Cr. Rep. 597, 37 Am. St. Rep. 834.

The statutes of some of the states, notably Georgia, require that there shall be some persuasion in addition to the promise of marriage, in order to make the act a crime. But such a statute would seem to require little, if any, more evidence than is requisite to secure a conviction where the seduction is accomplished by a mere promise of marriage. Thus in *Wilson v. State*, 58 Ga. 328, where the statute required both "persuasion and promises of marriage," the court held that seduction was accomplished within the meaning of the statute where there was a courtship, followed by an engagement to marry, and the successful use of that engagement, on the part of the suitor, to accomplish the ruin of a virtuous and confiding woman. "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterward undo her under a solemn repetition of the engagement vow, is to employ persuasion as well as promises of marriage." But there must be some evidence from which it can be determined that there was persuasion. Hence, where the parties were engaged, but the man did not use the engagement as an inducement to the intercourse, and, so far as appeared, there was no solicitation, importunity, or suggestion proceeding from him, and in fact it was not shown that the proposition for intercourse came from the man at all, it was held that seduction had not been proven: *O'Neill v. State*, 85 Ga. 383. It is doubtful whether such a state of facts would have justified a conviction for seduction under promise of marriage. A promise of marriage under which a woman undertakes to sell her person does not make a case of seduction. The woman must believe the promise to be bona fide, and "she must yield to the solicitations of her pretended lover, and not merely submit to the demands of her purchaser": *Disharoon v. State*, 95 Ga. 351. See, also, *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664. From these cases it is apparent that seduction under a promise of marriage and seduction accomplished by persuasion and promises of marriage are practically the same offense. Intercourse secured by a blunt promise of marriage, which is nothing more than a bargain, is not seduction in either case, and in either case but slight additional evidence is required if the woman is apparently acting upon the promise of marriage in good faith: See, also, *Lewis v. People*, 37 Mich. 518.

The promise to marry need not be made at the time the seduction takes place. It may be made prior to the seduction, and, in fact, frequently is, and it does not matter whether the promise was repeated or not at the time the sexual intercourse takes place. All

that is required is that the intercourse shall be the consequence of the prior promise of marriage: *Bailey v. State*, 36 Tex. Cr. Rep. 540; *Armstrong v. People*, 70 N. Y. 38; *O'Neill v. State*, 85 Ga. 383. The promise to marry need not be a promise to marry immediately, but may be a promise to marry in the future. Either form of promise is sufficient: *Merrill v. State* (Tex., 1900), 57 S. W. Rep. 289. It is not necessary for the evidence to show any express or direct reference by the seducer to his promise of marriage as a means to accomplish his purpose, or that the consent of the female expressly rested by her upon such consideration. It is sufficient if the circumstances be such as to warrant the deduction that the act would not have been accomplished without, or in the absence of, such promise: *People v. Wallace*, 109 Cal. 611. The promise of marriage need not be expressed in any particular words. If the language is such as to imply a promise, it is sufficient, if it was intended to convey such a meaning and was so understood by the woman: *State v. Brinkhaus*, 34 Minn. 285. A promise on the part of the man alone seems to be all that is required. If a promise on the part of the woman is necessary at all, it may be inferred from the circumstances: *People v. Kane*, 14 Abb. Pr. 15.

In general, the promise of marriage need not be a valid one in fact, if it was understood to be valid and relied upon as such: *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211; *State v. Adams*, 25 Or. 172, 42 Am. St. Rep. 790. The offense consists in seducing an unmarried female under promise of marriage. It is enough that a promise is made, which furnished the inducement for the intercourse: *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. Hence, an infant, who is incapable of contracting marriage, may be guilty of seduction under promise of marriage, and his conviction cannot be avoided by proof that his promise was not legal and binding: *People v. Kehoe*, 123 Cal. 224, 69 Am. St. Rep. 52; *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211. The question has frequently arisen whether a promise of marriage conditioned on pregnancy will warrant a conviction for seduction. The better rule seems to be that seduction must be accomplished by means of an absolute promise of marriage, or one which would become absolute the moment the woman yields. The object of the statute, said the court in *State v. Adams*, 25 Or. 172, 42 Am. St. Rep. 790, "is not to punish illicit intercourse, but to punish the seducer who, by means of a promise of marriage, destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfill his promise. . . . When the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall

within the statute." The same rule was announced in *People v. Van Alstyne*, 144 N. Y. 361, where the court said that "the statute was passed to protect a confiding and chaste woman in yielding to the solicitations of the man who had promised to marry her. It was not the purpose of the law to throw its protection around the woman who was willing to consent to the act, and who only asked for a promise of marriage in case her lapse from chastity should be discovered by reason of her pregnancy." This case disposes of any earlier cases which seemed to countenance a contrary doctrine, such as *Armstrong v. People*, 70 N. Y. 38, and *People v. Hustis*, 32 Hun. 58. *People v. Duryea*, 81 Hun. 390, is in harmony with the principal New York case we have cited, and holds that a promise conditioned upon pregnancy is insufficient. Where the statute does not require that seduction shall be accomplished under a promise of marriage, but may be accomplished by any sufficient promise or persuasion, it seems that seduction may be accomplished under a promise of marriage conditioned upon pregnancy. The question becomes one of fact to be determined from all the circumstances surrounding the case. So, in *State v. Hughes*, 106 Iowa, 125, 68 Am. St. Rep. 288, where a man twenty-two years of age, while paying his addresses to an unsophisticated country girl of seventeen, succeeds in having sexual intercourse with her under his promise to marry her in event of her becoming pregnant, it was held that such transaction might constitute seduction, as it could not be said as a matter of law that the girl was unchaste in yielding on the strength of such promise, or that she submitted as a result of passion, rather than of the promise.

In most of the states, if not all, the woman must have been an unmarried female in order to be seduced. The statute usually states that the offense must be committed against an unmarried female of previous chaste character: *State v. Carr*, 60 Iowa, 453; *West v. State*, 1 Wis. 209. Even if the statute does not so provide, if the offense can only be committed by means of a promise of marriage, the woman must have been an unmarried female at the time, otherwise she cannot be said to have been seduced under a promise of marriage: *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492; *State v. Reed*, 153 Mo. 451; *Norton v. State*, 72 Miss. 128, 48 Am. St. Rep. 538; *Mesa v. State*, 17 Tex. App. 395. It has been held in Upper Canada that a widow is not an unmarried female within the meaning of a statute giving the father a right of action to sue for her support: *Kirk v. Long*, 7 U. C. C. P. 363; *Anderson v. Rannie*, 12 U. C. C. P. 536.

It is not essential to the crime of seduction that the man should be unmarried. This is especially true where the crime may be committed by means other than a promise of marriage. Though it seems that in such a case if the woman knows the man is married, and she permits him to approach her with extraordinary promises,

these are matters which may be considered by the jury in determining the woman's chastity: *State v. Groome*, 10 Iowa, 308. In many of the states, however, the seduction must have been accomplished under a promise of marriage. And, if the woman knows the man is married, she must of necessity know that he cannot make a valid promise of marriage, and under such a situation there could be no seduction. The statutes require that the woman shall be misled and deceived by the promise of marriage; the promise must be one that is calculated to win the confidence and allay the suspicions of a modest woman. A woman cannot be deceived by the promise of a married man that he will marry her, when she is well aware of the fact that he cannot marry her. "The woman who listens to such a promise," said the court in *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664, "is either a fool, or she is a bad woman already. The confidence of no good woman could be acquired by any such a promise. It could not be made the means of seduction. It is upon its very face a warning to beware. . . . No reasonable being could confide in such a promise or be betrayed by it into confidence in the man who made it. The girl who listens to such a promise is not betrayed, and if under such an excuse as that she toys and is finally a criminal, she is not seduced, but has run, of her own lusts, into sin." The cases are a unit upon this point: See *Norton v. State*, 72 Miss. 128, 48 Am. St. Rep. 538; *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492; *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211.

As a general rule, the good faith of the defendant in making the promise of marriage, and the fact that he intended to marry the woman are immaterial: *State v. Brandenburg*, 118 Mo. 181, 40 Am. St. Rep. 362; *State v. Bierce*, 27 Conn. 319; *People v. Hough*, 120 Cal. 538, 65 Am. St. Rep. 201. In some states, however, an offer to marry the female seduced, if made in good faith, is a defense to a prosecution for the offense: *Wright v. State*, 31 Tex. Cr. Rep. 354, 37 Am. St. Rep. 822. But an offer to marry, made by one who is without ability to perform his promise, as a promise made by an infant, is not an offer of marriage made in good faith: *Merrell v. State (Tex.)*, 57 S. W. Rep. 289. Generally, however, when the statute makes any provision relative to marriage a defense, there must be an actual marriage to bar the prosecution, and a mere willingness to marry is insufficient: *People v. Hough*, 120 Cal. 538, 65 Am. St. Rep. 201; *State v. Wise*, 32 Or. 280. The effect of such marriage is that it is a complete bar to any prosecution, and the question of good faith on the part of the man in entering into such marriage cannot affect the question of his guilt or innocence: *People v. Gould*, 70 Mich. 240, 14 Am. St. Rep. 493. And it seems that where a bona fide offer of marriage amounts to a defense, the good faith of the man can be questioned only by his unwillingness to have the

marriage ceremony performed, and it cannot be questioned by evidence that he had declared that he would not live with the woman if he was married to her. Even if he intended to desert her immediately after the marriage ceremony, this does not impeach his good faith in being willing to marry her: *Wright v. State*, 31 Tex. Cr. Rep. 354, 37 Am. St. Rep. 822.

Crime.—A Previous Chaste Character is one of the essential elements in the crime of seduction: *Smith v. State*, 107 Ala. 139. We have already seen that this is not the rule in civil actions for seduction, but that the question of the previous chastity of the woman generally affects only the question of damages, and does not furnish a complete bar to the action. Usually, the statute which defines the crime states in express terms that the woman must be of previous chaste character. But, even if the statute is silent as to the character or repute of the female, the courts hold that a previous chaste character is a necessary ingredient in the offense. The character of the female is necessarily involved in every prosecution for seduction. If the statute does not expressly so state, it is plainly implied. "The legislature," as was said in *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, "never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of easy virtue, where she had consented even under a promise of marriage." To the same effect are *People v. Brewer*, 27 Mich. 134; *People v. Clark*, 33 Mich. 112; *Norton v. State*, 72 Miss. 128, 48 Am. St. Rep. 538. In *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592, where there were repeated acts of intercourse, all of which took place under a promise of marriage, it was held that a woman could be seduced but once; and that seduction took place at the time of the first voluntary act of sexual intercourse on her part, after she was able to understand its nature and comprehend its enormity. After this first offense she is no longer of that actual personal chastity which the law requires and which is an essential ingredient of the offense, and the subsequent acts, therefore, do not constitute seduction because of the lack of a previous chaste character. *People v. Clark*, 33 Mich. 112, was a somewhat similar case. The court said that while there might be a second or a third seduction, yet "where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed, otherwise there could be no seduction," because of the lack of previous chaste character.

There has arisen some difference of opinion as to the proper meaning of the words "chastity" or "chaste character" in statutes defining seduction. The authorities seem to be harmonious upon the proposition that such words refer to actual chastity and not to the mere reputation for chastity. Such words were intended to signify that which the woman really is, in distinction from that

which she may be reputed to be: *Carroll v. State*, 74 Miss. 688, 60 Am. St. Rep. 539; *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708; *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592. But as to whether the words should be construed to mean more than mere actual chastity, the authorities are not altogether in accord. In *Powell v. State* (Miss.), 20 So. Rep. 4, it was held that it was sufficient if the girl had never had sexual intercourse, although her reputation might be bad. "So long as the girl remains personally pure, so long as she is free from the pollution of criminal sexual intercourse, so long is she entitled to the protection of the law. . . . She may shock with the indiscretion of her speech and the freedom of her manners, and yet have never had a thought of parting with virtue; and until she does part with her virtue, she is regarded by the law as of chaste character." This seems to be the rule supported by the great weight of authority. In *Mills v. Commonwealth*, 93 Va. 815, it was said that the chastity which was protected by the statute was the absence of actual personal defilement. Chastity, in the case of an unmarried woman, was defined in *People v. Kehoe*, 123 Cal. 224, 69 Am. St. Rep. 52, as meaning simply that the woman was *virgo intacta*. And hence want of chastity was not established by her permitting familiarities, liberties, or even indecencies at the thought of which other women would blush. The same ruling was had in *State v. Brinkhaus*, 34 Minn. 285, where the court said that although a female may, from ignorance or other causes, have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet if she have enough of the sense of virtue that she would not surrender her person, unless seduced to do so under a promise of marriage, she was nevertheless a woman of chaste character within the meaning of the statute. In *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708, the court entertained a view different from that we have just been considering. Here it was said that the term "previous chastity" signified more actual chastity or freedom from sexual intercourse; but that "previous chaste character" meant not merely this, but also purity of mind and innocence of heart. In reaching this conclusion the court said: "We cannot think that a female who delights in lewdness—who is guilty of every indecency, and lost to all sense of shame, and who may be even the mistress of a brothel—is equally the object of this statute (if she has only escaped actual sexual intercourse) with an innocent and pure woman; and that a man is equally liable under the law, as well in the one case as the other. The statute is for the protection of the pure in mind, for the innocent in heart, who may have been led astray, seduced from the path of rectitude. . . . Under this construction of the statute, obscenity of language, indecency of conduct, and undue familiarity with men have more weight than under the other view." And in *Creighton v. State* (Tex. Cr. App. 1898), 51 S. W. Rep. 910, it was held that evidence that the prosecutrix had kissed and been kissed

and embraced by other men than the defendant was admissible, as tending to show lack of chastity: See, also, *Boak v. State*, 5 Iowa, 430. This rule, however, leaves the question open for the jury to determine whether the previous acts of familiarity were such as to deprive the woman of her chaste character, and by reason of this the two rules are frequently not very different in their practical effect. Thus in *State v. Olson*, 108 Iowa, 667, where the evidence showed that the girl had on several occasions prior to the alleged seduction acted very imprudently with other men, the jury found that she was nevertheless of chaste character. The statute in Georgia uses the terms "virtuous" woman instead of one of "previous chaste character," and the question arose whether more than actual chastity was necessary. It would seem that actual chastity was all that the statute contemplated, for the court, in *O'Neill v. State*, 85 Ga. 383, said that unmarried females who are virgins are virtuous. The fact that a woman is of a lustful and passionate nature, was recognized in *Keller v. State*, 102 Ga. 506, as no reason why she should not be considered virtuous, if she had never indulged in sexual intercourse. To the same effect is *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664. But it seems that proof that the woman is not virtuous—that is, that she is not a virgin—may be shown by acts other than actual illicit intercourse itself. The surrender of virginity may be inferred by the jury from lewd conduct. It is the province of the jury "to decide from the evidence whether the female alleged to have been seduced was a virgin at the time she yielded her person to the accused," said the court in *O'Neill v. State*, 85 Ga. 383. "And upon this question all facts and circumstances tending to show a debauched mind, such as lewd conduct and behavior before that time, may be considered; for the jury need not have direct or positive evidence of her previous connection with some other person, but only such evidence as satisfies them that she had parted with her virginity." And as was observed in *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664, "the proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize a jury to infer actual guilt, the illicit act." Evidence of reputation is inadmissible, for it is the woman's real character and not her reputation which is in issue: *State v. Prizer*, 49 Iowa, 531, 31 Am. Rep. 155. And where "chaste character" means mere freedom from sexual intercourse, this character may be impeached only by evidence of specific acts of lewdness: *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *State v. Patterson*, 88 Mo. 88, 67 Am. Rep. 374; *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17.

The courts are divided upon the proposition whether the woman's chaste character is presumed in the first instance, or whether it must be proved by the state as one of the ingredients of the crime. In Iowa the chaste character of the female is presumed, and the

burden is on the defendant to show her bad character: *Andre v. State*, 5 Iowa. 389, 68 Am. Dec. 708; *State v. Burns* (Iowa, 1899), 78 N. W. Rep. 681; *State v. McClintic*, 73 Iowa, 663. And this presumption is not overcome by evidence offered on the part of the defendant that he had intercourse with the woman the week before the time at which she says the seduction occurred: *State v. Bauerkemper*, 95 Iowa, 562. In some other states the previous chastity of the prosecutrix is presumed where there is no evidence to the contrary: *People v. Squires*, 49 Mich. 487; *People v. Brewer*, 27 Mich. 134; *O'Neill v. State*, 85 Ga. 383. But, when there is introduced evidence tending to prove unchastity of the woman, reasonable doubt of her chastity is as fatal to a conviction as is the existence of such doubt in reference to any other material fact: *Suther v. State*, 118 Ala. 88. In those states in which the statute defining seduction expressly makes the woman's previous chaste character an ingredient in the offense, the general rule is that the state must prove, primarily, such previous chaste character: *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492; *West v. State*, 1 Wis. 209; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372. But in proving the previous chaste character, the general reputation of the woman for chastity is admissible in corroboration of her own testimony, since usually this is the only corroborative evidence as, in the nature of the case, is obtainable: *State v. Lockerby*, 50 Minn. 363, 36 Am. St. Rep. 656; *People v. Samonset*, 97 Cal. 448. In some states the statute requires that the woman shall be of good repute: *Bowers v. State*, 29 Ohio St. 542; *State v. Hill*, 91 Mo. 423; *State v. Bryan*, 34 Kan. 63. In such case there is usually no presumption of the woman's good repute, but this must be affirmatively shown by the prosecution: *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Oliver v. Commonwealth*, 101 Pa. St. 215, 47 Am. Rep. 704; *State v. Hill*, 91 Mo. 423; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372; *State v. McCaskey*, 104 Mo. 644. A statute of this character has been held to bring in issue only the reputation of the woman, and that consequently evidence as to previous conduct is inadmissible and the proof must be confined to reputation: *Bowers v. State*, 29 Ohio St. 542; *State v. Bryan*, 34 Kan. 63. On the other hand, where similar statutory provisions prevail, it has been held that the bad repute of the prosecutrix might be shown by evidence of previous acts of lewdness and unchastity with other men. This, we believe, is the sounder rule: *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Wheeler*, 94 Mo. 252.

The previous chaste character must be immediately prior to the alleged seduction: *State v. Gates*, 27 Minn. 52. Unchaste conduct on the part of the woman after the time of the seduction is inadmissible in evidence, since it has no bearing on her chastity at the time of the seduction: *State v. Deitrick*, 51 Iowa, 467; *State v. Wells*, 48 Iowa, 671. Evidence of prior unchaste conduct must be confined to a period immediately previous to the guilty conduct of

the defendant. Hence, evidence of improper conduct of the prosecutrix eight years before the trial, when she was only fourteen years of age, is incompetent to prove her character unchaste: *State v. Dunn*, 53 Iowa, 526. This must necessarily be true, because a woman, although she had previously fallen from virtue, yet she may reform and become chaste again, so that she may be subject to seduction the same as any other woman: *Carpenter v. People*, 8 Barb. 603. The statute does not require that the woman shall have never had sexual intercourse at all: *State v. Sharp*, 132 Mo. 165. But, if there has been previous illicit intercourse with other men, the woman must have reformed, otherwise she cannot be seduced: *Smith v. State*, 118 Ala. 117. A fallen woman cannot be seduced, but a fallen woman who has reformed is deemed to be chaste and is within the protection of the statute: *Suther v. State*, 118 Ala. 88; *Wilson v. State*, 73 Ala. 527. But there must be a complete reformation on principle: *State v. Timmens*, 4 Minn. 325. Where a reasonable period has elapsed between the previous acts of intercourse and the acts charged against the defendant, the presumption is in favor of reformation. But where the repetitions are frequent and the intervals short, no such presumption arises, and the burden of proving reformation is upon the prosecution: *People v. Clark*, 33 Mich. 112; *People v. Squires*, 49 Mich. 487. Where the defendant had once seduced the prosecutrix, but she had broken off all relations with him and lived a blameless life for a year, when she was again seduced, it was held that she was a chaste woman at the time of the second seduction, there being sufficient evidence of reformation: *State v. Moore*, 78 Iowa, 494; *People v. Millspaugh*, 11 Mich. 278.

In conclusion, then, seduction as a crime may be defined as the act of a man in inducing a woman of previous chaste character or good repute to have unlawful sexual intercourse with him, either by means of promises, persuasion, or arts of deception, or by means of a promise of marriage, or by means of a promise of marriage and some other persuasion.

HARBISON v. KNOXVILLE IRON COMPANY.

[103 TENNESSEE, 421.]

MASTER AND SERVANT—PAYMENT IN ORDERS INSTEAD OF CASH.—A STATUTE requiring employers to redeem in cash any coupons, scrip, punchouts, store orders, or other evidences of indebtedness which they have issued in payment of wages, provided such orders are presented at a regular pay-day or not less than thirty days after issuance, applies to all employers using this method of paying their employes, whether such use is habitual and arbitrary, or only occasional and without constraint.

STATUTES—BONA FIDE HOLDER.—To constitute one a bona fide holder of orders issued by an employer in payment of wages to his employé, within the meaning of a statute authorizing such holder to recover the face value of the orders from the employer, it is only necessary that he should have bought the orders fairly, honestly, and for a reasonable price, in good faith.

A CORPORATION IS A PERSON within the meaning of a constitutional provision that no person shall be deprived of life, liberty, or property, without due process of law.

CONSTITUTIONS.—THE WORD "LIBERTY," as used in a constitutional provision that no person shall be deprived of his liberty without due process of law, means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof.

CONSTITUTIONAL LAW.—THE WORD "PROPERTY" as used in a constitutional provision that no person shall be deprived of his property without due process of law, signifies not only those tangible things of which one may be the owner, but everything he may have of an exchangeable value, including the right to acquire and dispose of property, and the right to contract.

CONSTITUTIONS.—THE PHRASES "DUE PROCESS OF LAW" AND "THE LAW OF THE LAND" are synonymous.

CONSTITUTIONAL LAW.—"DUE PROCESS OF LAW" is the application of the law as it exists in the fair and regular course of administrative procedure.

CONSTITUTIONAL LAW.—"LAW OF THE LAND," when applied to general legislation, means law which embraces all persons who are or may come into like situation and circumstances.

CONSTITUTIONAL LAW.—"LAW OF THE LAND," when applied to special or class legislation, means not only law which embraces all persons in like situation, but it means that the classification must be natural and reasonable, not arbitrary and capricious.

CONSTITUTIONAL LAW—ABRIDGING RIGHT TO CONTRACT.—A STATUTE requiring all employers who pay their employés in "coupons, scrip, punchouts, store orders, or other evidences of indebtedness," to redeem the same at their face value in money, if demanded by the employé or a bona fide holder, is not an unconstitutional abridgment of the right of employers to contract and does not deprive such employers of their liberty or property without due process of law, since it is general in its terms, embracing every employer or employé in like situation, and it is enforceable in the usual modes established in the administration of government.

POLICE POWER.—A STATE, in the exercise of its police power, may enact any law, not in plain conflict with some provision of the state or federal constitution, which is deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people.

POLICE POWER.—THE RIGHT OF CONTRACT between employer and employés is a legitimate subject for the exercise of the police power of a state.

Green & Shields, for the appellee.

Lucky, Sanford & Fowler, for the appellant.

⁴²⁴ CALDWELL, J. The bill in this case was filed to collect an alleged indebtedness of sixteen hundred and seventy-eight dollars. The chancellor granted the relief sought, and the court of chancery appeals affirmed his decree.

The defendant is a domestic corporation engaged in the manufacture and sale of iron and in the mining and sale of coal. It employs about two hundred laborers, and has one regular pay-day each month, being that Saturday which is the nearest to the 20th of the particular month. On this day each employé is paid in cash the amount due him up to the first day of the month, but never up to the day of payment. On every Saturday in the month, however, the defendant holds itself in readiness to pay all of its employés the full amount then due them if they will receive it in orders for coal, at twelve cents per bushel, and the afternoon of every Saturday, from 1 o'clock to 5 o'clock, is set apart for that purpose. About seventy-five per cent of all the wages earned by the laborers is paid in these coal orders. The orders are in the following form:

"Let bearer have ——— bushels of coal, and charge to my account.

"(Signed) ———.

"Accepted, ———, 1899.

"KNOXVILLE IRON COMPANY."

The complainant purchased six hundred and fourteen of these orders, aggregating sixteen hundred and seventy-eight dollars, and ⁴²⁵ thereafter presented them to the defendant on a regular pay-day and demanded payment in cash. Payment being refused, he brought this suit to collect the several orders. He bases his action on sections 1 and 2 of chapter 11 of the acts of 1899, which are in the following language, namely:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that all persons, firms, corporations, and companies, using coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay their or its laborers and employés, for labor, or otherwise, shall, if demanded, redeem the same in the hands of such laborer, employé, or bona fide holder, in good and lawful money of the United States; provided, the same is presented and redemption demanded of such person, firm, company, or corporation using same as

aforesaid, at a regular pay-day of such person, firm, company, or corporation to laborers or employés, or if presented and redemption demanded as aforesaid by such laborers, employés, or bona fide holders, at any time not less than thirty days from the issuance or delivery of such coupon, scrip, punchout, store order, or other evidences of indebtedness to such employés, laborers, or bona fide holder, such redemption to be at the face value of said scrip, punchout, coupon, store order, or other evidence of indebtedness; provided further, said face value shall be in cash the same as its purchasing power in goods, wares, and merchandise ⁴²⁶ at the commissary, company store, or other repository of such company, firm, person, or corporation aforesaid.

"Sec. 2. Be it further enacted, that any employé, laborer, or bona fide holder, referred to in section 1 of this act, upon presentation and demand for redemption of such scrip, coupon, punchout, store order, or other evidence of indebtedness aforesaid, and upon refusal of such person, firm, corporation, or company to redeem the same in good and lawful money of the United States, may maintain in his, her, or their own name, an action before any court of competent jurisdiction against such person, firm, corporation, or company using same as aforesaid, for the recovery of the value of such coupon, scrip, punchout, store order, or other evidence of indebtedness, as defined in section 1 of this act."

The company defends upon three grounds: 1. That the act does not apply to a case like this; 2. That complainant is not a bona fide holder; and 3. That the act is unconstitutional.

These defenses will be considered in the order named.

1. The substance of the first contention is that, by a correct construction, it must be held that: "All persons, firms, corporations, and companies using coupons, scrip, punchouts, store orders, ⁴²⁷ or other evidences of indebtedness to pay their or its laborers or employés," means only such persons, firms, corporations, and companies as are accustomed to use coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay their or its laborers or employés, and as so use them arbitrarily; and that the defendant has no such custom, and is therefore not included in the terms of the act. No reason is perceived by the court for so restricting and limiting the broad and unqualified words of the statute. The evident intention of the legislature was to include every person, firm, corporation and company using coupons, scrip, punchouts, store orders, or

other evidence of indebtedness to pay their or its laborers and employés, whether such use be habitual and arbitrary, or only occasional and without constraint.

But, if this were not true, the defendant is included by its own construction. The court of chancery appeals found that the defendant is so accustomed to use coal orders; that it in that "way pays off about seventy-five per cent of the wages earned by its employés," and that its course of business in that respect is one "whereby employés are systematically, in the main, settled with in coal orders instead of cash, and where, though there is no compulsion in form, yet, in fact, by holding back their wages such a motive power is brought to bear upon their freedom of choice as to practically amount to coercion"; that the facts ⁴²⁸ of the case "show a species of compulsion whereby the defendant takes advantage of the necessities or the improvidence of its employés, and so places them in a position where they feel compelled to take their wages in coal orders."

So that, by the true construction, and also by that suggested by the defendant, it is included in the provisions of the statute.

2. It is next contended that complainant is not a bona fide holder, because he purchased the coal orders sued upon at a discount of fifteen cents on the dollar. It is true that complainant gave only eighty-five cents on the dollar for these orders, but that does not prevent him from being a bona fide holder within the meaning of the statute. He made the purchases upon the open market, fairly and honestly, and gave ten cents more on the dollar for the orders than they had usually sold for. To constitute him a bona fide holder, it is only necessary that he should have bought the orders fairly, honestly, and for a reasonable price, in good faith, as contradistinguished from bad faith.

The suggestion that complainant's recovery, if allowed at all, should be limited to the price paid, is conclusively answered by the provision of the statute that the redemption or recovery shall be for "the face value of such scrip, punchouts, coupons, store orders, or other evidences of indebtedness."

⁴²⁹ 3. Finally, it is said that the act abridges the right of contract, and for that reason it is challenged as repugnant to that part of section 1 of the fourteenth amendment to the constitution of the United States which declares that no state shall "deprive any person of life, liberty, or property without

due process of law," and to that part of section 8 of article 1 of the constitution of Tennessee, which declares that "no man shall be deprived of his life, liberty, or property but by the law of the land."

A corporation is a "person" within the provision against deprivation of life, liberty, or property "without due process of law": *Covington etc. Road Co. v. Sandford*, 164 U. S. 578; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 154; *Dugger v. Insurance Co.*, 95 Tenn. 250; and it is a "man" within the provision against deprivation of liberty or property otherwise than by "the law of the land": *Railroad v. Harris*, 99 Tenn. 705; hence, the defendant, which is a corporation, is entitled to the protection guaranteed by both provisions.

The "liberty" contemplated in each provision means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, ⁴³⁰ to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof.

In *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 640, *Allgeyer v. Louisiana*, 165 U. S. 589, *Holden v. Hardy*, 169 U. S. 391, and *Powell v. Pennsylvania*, 127 U. S. 684, "property," as the word is there used, signifies not only those tangible things of which one may be the owner, but everything he may have of an exchangeable value. It includes the right to acquire and dispose of property, and to make all lawful contracts essential to those ends; and such contracts are entitled to the same protection as the property itself: *Holden v. Hardy*, 169 U. S. 391; *Dugger v. Insurance Co.*, 95 Tenn. 252; *Bank v. Divine Grocery Co.*, 97 Tenn. 611, 612. "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto": *Allgeyer v. Louisiana*, 165 U. S. 591. "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property, and of all solid individual and national prosperity": *Slaughterhouse Cases* (dissenting opinion of Judge Swayne), 16 Wall. 127.

Therefore, the right of contract is undoubtedly an inherent part of the right of liberty, and also ⁴³¹ of the right of property, and deprivation of it is equally forbidden. But none of

them are unlimited rights. All are subject to the law's control, and may, at any time, be abridged or enlarged or even destroyed within constitutional bounds. None of them can be affected or taken away, except by "due process of law" or the "law of the land"; yet all of them may be curtailed or destroyed by that means. The declaration against deprivation "without due process of law," or otherwise than by "the law of the land," necessarily implies that deprivation may be rightly accomplished and justified by such process or law. What, then, is "due process of law," or "the law of the land"? The two phrases have exactly the same import, and that which is entitled to recognition as the one is to be recognized as the other also: *Davidson v. New Orleans*, 96 U. S. 101; *Railroad v. Harris*, 99 Tenn. 704; *Cooley's Constitutional Limitations*, 5th ed., 431; *Black's Constitutional Law*, 479.

The present statute, if valid, is "the law of the land" as to the provisions thereof, and that which is accomplished by it is done "by due process of law." All valid laws, statutory and otherwise, now existing in this state, constitute the aggregate body of our present "law of the land"; and each part, each separate law that is complete in itself, may properly be called the "law of the land" as to the matter or matters ⁴³² embraced therein. Some of these laws are old and some are new. They are constantly changing, and, for that reason, it is impossible to formulate a definition that will, at all times, include everything that may be or come within and exclude everything that may be or fall without, the true meaning of the phrase, "law of the land."

Recognizing the difficulty of giving any "definition which would be at once perspicuous, comprehensive, and satisfactory," Mr. Justice Miller said it was a part of wisdom to ascertain the intent and application of so important a phrase "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded": *Davidson v. New Orleans*, 96 U. S. 104. A like view is still entertained and enforced by the supreme court of the United States: *Holden v. Hardy*, 169 U. S. 390.

Nevertheless, many useful and approved definitions are to be found, and a few of them are here repeated: "Due process of law is the application of the law as it exists in the fair and regular course of administrative procedure": *Slaughterhouse Cases*, 16 Wall. 127. "As to the words from Magna Charta

incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to ⁴³³ this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice": *Bank of Columbia v. Okely*, 4 Wheat. 244. "By 'the law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society": *Mr. Webster's Argument in Dartmouth College v. Woodward*, 4 Wheat. 518. "'Due process of law' is process due according to 'the law of the land.' This process in the states is regulated by the law of the state": *Walker v. Sauvinet*, 92 U. S. 93. "Whatever in the regular administration of law in a state is general and impartial in its operations on all persons, is 'due process'": 2 *Tucker's U. S. Const.*, sec. 390. "Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of a state the constitutional requisition is satisfied: 2 *Kent's Commentaries*, 13; and 'due process' is so secured by laws operating on all alike, and not subjecting the individual to arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice": *Caldwell v. Texas*, 137 U. S. 697. ⁴³⁴ "It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without 'due process of law,' if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters—that is, by process or proceedings adapted to the nature of the case": *Dent v. West Virginia*, 129 U. S. 124.

When applied to general legislation, "the clause 'law of the land' was defined in our earlier cases to mean a general and public law, equally binding upon every member of the community; but by our later cases it is defined to mean law 'which embraces all persons who are or may come into like situation and circumstances'": *Stratton Claimants v. Morris Claimants*, 89 Tenn. 521; *Sutton v. State*, 96 Tenn. 703; *Henley v. State*, 98 Tenn. 698; and when applied to special or class legislation it means, in addition, that "the classification must be natural

and reasonable, not arbitrary and capricious": *Sutton v. State*, 96 Tenn. 710; *Railroad v. Harris*, 99 Tenn. 705.

Though operating equally on all persons in like condition while in existence, the "law of the land" on no subject can be truly said to be immutable. On the contrary, it is always subject to change, by diminution or enlargement, by repeal ⁴³⁵ or substitution, as different and new conditions arise; otherwise, there could be no advance in legislation or legal development, and the legislative department of the government would be wholly unnecessary and superfluous. The law is, in fact, a progressive science, and its growth must be allowed to keep pace with the advance of civilization.

Mr. Justice Matthews says: "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history, but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. 'Due process of law,' in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, *Suum cuique tribuere*. There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the ⁴³⁶ best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our situation and system will mold and shape it into new and not less useful forms": *Hurtado v. California*, 110 U. S. 531.

Some of the changes made in the common law, as the result of intelligent progress during the present century, are enumerated by Mr. Justice Brown, as follows: "The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely

swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemption from execution has been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. ⁴³⁷ Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all": *Holden v. Hardy*, 169 U. S. 386.

When first adopted in *Magna Charta*, the phrase, "the law of the land," had reference to the common and statute law then existing in England; and when embodied in our constitution, it referred to the same common law as previously modified, and so far as suited to the wants and conditions of our people in a new country. At present, "the law of the land" embraces the same body of laws as still further modified, those parts validly cut off being now excluded, and those validly added being now included. Every valid statute of the state now in existence, whenever enacted, is the present "law of the land" in respect to the subject matter of that statute; and every existing enactment, passed with due form and ceremony and not in conflict with some provision of the state or federal constitution, is a valid statute; and no statute, otherwise valid, is unconstitutional because affecting one's life, liberty, or property, if, when being general, it embraces all persons who are or may be in like situation and circumstances (*Stratton Claimants v. Morris Claimants*, 89 Tenn. 521; *Henley v. State*, 98 Tenn. 698), or, when being special, it is, in addition, natural and reasonable in its classification (*Sutton v. State*, 96 Tenn. 710; ⁴³⁸ *Railroad v. Harris*, 99 Tenn. 705), or, as otherwise expressed, "if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters": *Dent v. West Virginia*, 129 U. S. 124.

Confessedly, the enactment now called in question is, in all respects, a valid statute, and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is un-

constitutional and not the "law of the land" or "due process of law."

The act does, undoubtedly, abridge or qualify the right of contract, in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money; yet it is as certainly general in its terms, embracing equally every employer and employé who is or may be in like situation and circumstances, and it is enforceable in the usual modes established in the administration of government, with respect to kindred matters. The exact and precise requirement is that all employers, whether natural or artificial persons, paying their employés in "coupons, scrip, punchouts, store orders, or other evidences of indebtedness," shall redeem the same at face value in money, if demanded by the employé, or a bona fide holder, on a regular pay-day, or at any time not less than thirty ⁴³⁹ days from issuance: Acts 1899, c. 11, sec. 1; and that if payment be not so made upon such demand, the owner may maintain a suit on such evidence of indebtedness and have a money recovery for the face value thereof in any court of competent jurisdiction: Acts 1899, c. 11, sec. 2.

There is no prohibition against the issuance of any of the obligations referred to, nor against payment in merchandise or otherwise according to their terms, but only a provision that they shall be paid in money at the election and upon a prescribed demand of the owner. In other words, the effect of the act is to convert into cash obligations such unpaid merchandise orders, etc., as may be presented for money payment on a regular pay-day, or as much as thirty days after issuance.

Under the act, the present defendant may issue weekly orders for coal as formerly, and may pay them in that commodity when desired by the holder; but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way, and to this extent, the defendant's right of contract is affected.

Under the act, as formerly, every employé of the defendant may receive the whole or a part of his wages in coal orders, and may collect the orders in coal, or transfer them to some one else ⁴⁴⁰ for other merchandise, or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly, and thereby gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on

the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price.

The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and, by this act, undertook to ameliorate his condition in some measure by enabling him, or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employé upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation.

Being general in its operation and enforceable by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the "law of the land," and "due process of law," as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right ⁴⁴¹ of contract in the case of *Dugger v. Insurance Co.*, 95 Tenn. 245, and as had been previously decided in respect of other limiting statutes therein mentioned: *Dugger v. Insurance Co.*, 95 Tenn. 253, 254.

Furthermore, the passage of this act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self-protection, and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with some provision of the state or federal constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people: *New York v. Miln*, 11 Pet. 139; *Passenger Cases*, 7 How. 457; *Slaughterhouse Cases*, 16 Wall. 36-62; *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 111 U. S. 746; *Bowman v. Chicago etc. R. R. Co.*, 125 U. S. 465; *Lawton v. Steele*, 152 U. S. 136; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 172; *Smith v. State*, 100 Tenn. 494; *Austin v. State*, 101 Tenn. 567, 70 Am. St. Rep. 703; *Cooley's Constitutional Limitations*, 5th ed., 706; *Black's Constitutional Law*, sec. 154, and other authorities too numerous to mention.

This power is an important and comprehensive one, and its application must be expected and allowed to expand and take in new subjects from time to time, as trade and business advance and new conditions arise. The scope of its exercise, ⁴⁴²

within the bounds already mentioned, is limited only by the requirement that it shall not arbitrarily and unreasonably affect the citizen in his life, liberty, and property. It cannot be an excuse for oppressive legislation: *Davidson v. New Orleans*, 96 U. S. 97; *Yick Wo v. Hopkins*, 118 U. S. 356; but it covers everything relating to the public interests, and, in its exercise, a large discretion is necessarily vested in the legislature, which, in the first instance, is presumed to know not only what the welfare of the public requires, but also what measures are necessary for its advancement: *Kidd v. Pearson*, 128 U. S. 1; *Lawton v. Steele*, 152 U. S. 136.

The right of contract and of property is always subject to reasonable limitation under the state's reserved police power. As to this, Chief Justice Shaw said: "We think it a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from ⁴⁴³ being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the constitution, may think necessary and expedient": *Commonwealth v. Alger*, 7 Cush. 53, 84.

This language is quoted by Judge Cooley in his *Constitutional Limitations*, on page 707, and by Mr. Justice Brown, in *Holden v. Hardy*, 169 U. S. 392.

It is readily seen from the analysis already given that the limitation placed upon the right of contract by this act is not arbitrary and oppressive, but entirely just and reasonable. While in some sense qualifying certain contracts of the employer, it in no sense works a great hardship upon him. It only requires that, in certain events, he shall pay the wages of his employé in money, rather than in something less desirable. The legislature, as it thought, found the employé at a disadvantage in this respect, and by this enactment undertook to place him and the employer more nearly upon an equality. This alone commends the act and entitles it to a place on the statute book as a valid police regulation.

Besides the amelioration of the employé's condition in the way mentioned, the act was intended and is well calculated to promote the public peace and good order, and to lessen the growing tendency to strife, violence, and even bloodshed ⁴⁴⁴ in certain departments of important trade and business. In the case of *Holden v. Hardy*, 169 U. S. 392, already referred to, the court held that a statute of Utah, making it a misdemeanor to employ laborers to work under the ground or in smelters for a period of more than eight hours per day except in cases of emergency, was valid as a police regulation. In the conclusion of the opinion in that case, the court mentioned the disadvantage of the employé in the matter of contracting, and justified the state's interference for his protection, and, in doing so, used the following well-chosen language: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, but that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge, to conform to regulations which their judgments, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority": *Holden v. Hardy*, 169 U. S. 397.

In that case, as in this one, the counsel of ⁴⁴⁵ the employer urged that the act worked a peculiar hardship upon the employer, in that it violated his right to contract as he pleased. To that contention the court aptly replied: "The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer'": *Holden v. Hardy*, 169 U. S. 397.

Acts touching the question of contracts between employer and employé in different ways have been passed in several of the states. Most of them, unlike ours, have been both prohibitory and penal. Some have stood the test of constitutionality in the states where passed, and others have not. Enactments against the use of merchandise orders instead of money in the payment of wages have been adjudged unconstitutional and void in Pennsylvania, Missouri, and West Virginia, in some instances upon the ground that the legislation was partial, and in others for the additional reason that it was deemed an arbitrary interference with ⁴⁴⁶ the right of contract: *Godechilds v. Wigeman*, 113 Pa. St. 431; *Showalter v. Ehlan* (Pa.), 4 Gen. Dig. 350; *State v. Loomis*, 115 Mo. 307.

But, after the decision of the last-named case, the court deciding it upheld an act of similar import, though more general in its application: *State v. Peel Splint Co.*, 36 W. Va. 802; and an Indiana statute requiring the payment of wages in lawful money of the United States, and not otherwise, has been adjudged valid as to antecedent contracts to the contrary, in the case of *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396. Likewise, a Kentucky statute, providing that wage earners "shall be paid for their labor in lawful money," has been, by the court of last resort in that state, treated as valid when applied to cases contemplated by the legislature in passing it, but, at the same time, the court held the statute to be inapplicable to a case where the laborer, in advance of reasonably frequent pay-days, voluntarily applied for and received a merchandise order for wages not yet due: *Avent Beattyville Coal Co. v. Commonwealth*, 96 Ky. 218.

The supreme courts of Massachusetts, Rhode Island, and Maryland have sustained as constitutional statutes requiring the weekly payment of wages (*In re House Bill 1230*, 163 Mass. 589; *State v. Brown etc. Mfg. Co.*, 18 R. I. 16; *Shaffer v. Union Min. Co.*, 55 Md. ⁴⁴⁷ 74), while the supreme court of Illinois has held the contrary in respect to a like statute: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206.

An act requiring bi-weekly payment of wages was adjudged constitutional in Indiana in the case of *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396. Legislation limiting a day's work to eight hours has been adjudged unconstitutional, null, and void in Illinois and Nebraska, because special, and also because an unwarranted infringement upon the right of contract: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315; *Low*

v. Rees Printing Co., 41 Neb. 127, 43 Am. St. Rep. 670; but a similar enactment has been sustained in Utah and in the supreme court of the United States as a valid police regulation: Holden v. Hardy, 169 U. S. 366, 369.

Numerous other cases bearing upon these and other aspects of the same general subject are readily found, but their citation at this time is unnecessary.

The act before us is, perhaps, less stringent than any one considered in any of the cases mentioned. It is neither prohibitory nor penal, not special but general, tending toward equality between employer and employé in the matter of wages, intended and well calculated to promote peace and good order, and to prevent strife, violence, and bloodshed. Such being the character, purpose, and tendency of the act, we have no hesitation in holding that it is valid, both as general ⁴⁴⁸ legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power.

It does not work an arbitrary and oppressive deprivation of the right of a solvent debtor to use, sell, and convey a part of his property in the payment of a part of his debts in good faith, as did the act held to be obnoxious to the constitution in the case of Bank v. Divine Grocery Co., 97 Tenn. 603, 610, but, in its relation to the right of contract, it is somewhat closely related to that legislation which prohibits, nullifies, and vitiates the stipulation in fire insurance policies, known as the three-fourths clause, which was sustained as constitutional in the case of Dugger v. Insurance Co., 95 Tenn. 245. In the course of the opinion in this case, Judge Beard observed that "the right of contracting with regard to one's own is subject to legislative control and conditions," and the observation was abundantly illustrated and supported by the citation of many limiting statutes and well-considered cases: Dugger v. Insurance Co., 95 Tenn. 253, 254.

In the case of Truss v. State, 13 Lea, 311, an enactment which so far affected the contract rights of purchaser and seller of cotton as to forbid its sale between "sunset and sunrise" was treated as a legitimate exercise of legislative power, though only the sufficiency of the title was actually discussed in the opinion.

Let the decree be affirmed.

THE CASE of Dayton etc. Co. v. Barton, 103 Tenn. 604, arose under the same statute as is considered in this case. The holding is precisely the same and upon similar grounds. The facts of the two cases differ in this particular, that in *Dayton etc. Co. v. Barton, 103 Tenn. 604*, the punchouts, on their face, were not transferable, and could be used only by the party in whose favor they were made. This was immaterial, however, since the statute authorized a recovery by any bona fide holder, and the plaintiff, being such a holder, was within the protection of the statute.

CONSTITUTIONAL LAW.—“LIBERTY,” as that term is used in a constitution, means not only freedom of the citizen from servitude and restraint, but also embraces the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraint necessary to secure the common welfare: *Ruhrstrat v. People, 185 Ill. 133, ante, p. 30.*

CONSTITUTIONAL LAW.—THE RIGHT OF PROPERTY preserved by all constitutions is the right not only to possess and enjoy it, but also to acquire it by any lawful mode or pursuit: *Braceville Coal Co. v. People, 147 Ill. 66, 37 Am. St. Rep. 206*; by labor or contract: *State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443.*

DUE PROCESS OF LAW.—CORPORATIONS are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law: See the extended note to *St. Louis etc. Ry. Co. v. Paul, 62 Am. St. Rep. 168.*

“DUE PROCESS OF LAW” AND “LAW OF THE LAND” are synonymous phrases. They refer to general, public law, operating upon all alike, and not to partial or private laws: *Harding v. People, 160 Ill. 459, 52 Am. St. Rep. 344.*

DUE PROCESS OF LAW MEANS in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights: *Burdick v. People, 149 Ill. 600, 41 Am. St. Rep. 329.* It is not necessarily judicial process; administrative process, regarded as necessary in government and sanctioned by long usage, is as much due process of law as any other: *Attorney General v. Jochim, 99 Mich. 358, 41 Am. St. Rep. 606.*

DUE PROCESS OF LAW MEANS the law of the land, by which is to be understood laws general in their operation, and not special laws passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing laws: *Attorney General v. Jochim, 99 Mich. 358, 41 Am. St. Rep. 606.*

POLICE POWER—REGULATION OF LABOR AND OCCUPATIONS.—The natural right to labor and enjoy its fruits is subject to reasonable legislative regulation, but cannot be unreasonably interfered with: *State v. Gardner, 58 Ohio St. 599, 65 Am. St. Rep. 785.* The right of every person to pursue any lawful business or occupation is subject to the paramount right inherent in every government to impose such restrictions and regulations as the protection of the public may require: *State v. Randolph, 23 Or. 74, 37 Am. St. Rep. 655.*

CONSTITUTIONAL LAW—WAGES.—On the validity of statutes regulating the payment of wages to employes, see *Slocum v. Bear Valley Irr. Co., 122 Cal. 555, 68 Am. St. Rep. 68*; and the monographic note to *State v. Goodwill, 25 Am. St. Rep. 881, 882.*

GARLAND v. AURIN.

[103 TENNESSEE, 555.]

WATERS AND WATERCOURSES—DRAINAGE OF SURFACE WATER.—The proprietor of land, whether urban or rural, has an easement for the drainage of surface water in its natural flow over the lower lands of an adjacent proprietor, and the latter proprietor is liable in damages to the former for any obstruction to the natural flow of such water.

REAL PROPERTY—DAMAGES TO MERE OCCUPANT.—The rightful occupant of real property, whether the owner in fee, a life tenant, or a lessee, may recover for any injury to his possession by the wrongful act of another.

REAL PROPERTY—INJURY TO OCCUPANT OF.—The owner of real property who wrongfully causes noxious vapors to rise on the land of another is liable therefor, the same as if such vapors had been wrongfully caused to rise from his own land.

NEGLIGENCE—PLEADING PROXIMATE CAUSE.—It is not necessary to aver in terms that the wrongs of the defendant were the natural and proximate cause of the plaintiff's injury. It is sufficient if it substantially appears that the defendant's wrongful acts were the cause of the plaintiff's injury.

Ingersoll & Peyton, for the appellant.

Green & Shields, for the appellee.

556 CALDWELL, J. This is an action of damages, brought by the occupant of a city lot against the owner of an adjacent and lower lot for creating an alleged private nuisance by filling such lower lot with earth, garbage, etc., and thereby obstructing the natural drain of surface water, and backing the same upon plaintiff's lot, and there making a stagnant pond, which impaired the use of the premises, and, through noxious vapors emitted, caused sickness to the plaintiff. The defendant demurred upon four grounds: 1. That being within the city limits, the defendant had the legal right to fill or raise his lot, as it is alleged he did, though he thereby impeded and prevented the passage of surface water from the plaintiff's lot over his own; 2. That plaintiff, being only **557** the occupant and not the owner of the lot alleged to have been injured, cannot maintain this suit; 3. That since the noxious vapors complained of are alleged to have risen from the lot occupied by the plaintiff, and not from that of defendant, there is no cause of action on account thereof against the defendant; and 4. That the plaintiff does not allege that the wrongs complained of were the natural and proximate cause of her sickness.

Two distinct rules have been administered in the various states of the Union with respect to the right of a lower proprietor to obstruct and repel surface water flowing from the land of a higher proprietor—one being called the common-law rule and the other the civil-law rule. Under what is known as the common-law rule, the holding is that the right of the lower proprietor to occupy and improve his land in such manner and for such purposes as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, is not restricted or modified by the fact that such improvements or occupation will obstruct and repel surface water that would otherwise naturally flow thereon from adjacent and higher land, even though the land of the upper proprietor may be injured thereby.

This rule is based largely upon the maxim, "*Cujus est solum, ejus est usque ad coelum et 558 ad infernos*," and seems to be administered in the states of Connecticut, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, and perhaps in Texas (except as to railroads), Vermont, and Wisconsin.

On the contrary, by the rule of the civil law, the proprietor of the lower land may not obstruct, by any means, the natural flow of surface water, and turn it back, to the injury of the higher lands of his neighbor, the latter owner having, by the law of nature, an easement or servitude of drainage over the lands of the former for the flow of surface waters. This rule is based partly upon the necessity of the situation and partly upon the maxim, "*Sic utere tuo ut alienum non laedas*," and appears to prevail in Arkansas, Alabama, California, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas (as to railroads), Virginia, and West Virginia.

There have seemingly been some changes from one rule to the other in Arkansas, Missouri, Iowa, New Hampshire, and some of the other states; and South Carolina appears to occupy a kind of middle ground between the two, allowing the lower owner to make any reasonable use of his land which may not unreasonably injure adjacent property above.

The two rules are considered, and most of the adjudged cases cited, in 24 American and English Encyclopedia of 559 Law, 907-922; in *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163, 21 L. R. Ann. 593, 608, and note; in *Sheehan v.*

Flynn, 59 Minn. 436, 26 L. R. Ann. 632, and note; in *Vanderwiele v. Taylor*, 65 N. Y. 341, 345; in *Barkley v. Wilcox*, 86 N. Y. 141, 40 Am. Rep. 519; in *Waverly v. Page*, 105 Iowa, 225; 40 L. R. Ann. 465, and note; and in *Cooley on Torts*, 574, 580.

Judge Dillon, adopting the remark of Lord Tenterden (*Rex v. Commissioners*, 8 Barn. & C. 355, 360), in reference to the rights of owners along the seacoast, says that the law largely regards surface waters a common enemy, which every proprietor may fight or get rid of as best he may: 2 *Dillon on Municipal Corporations*, 4th ed., sec. 1039.

The cases decided by this court are *Carriger v. East Tennessee etc. R. R. Co.*, 7 Lea, 388, *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291, and *Railway Co. v. Mossman*, 90 Tenn. 157, 25 Am. Rep. 670. All of these cases give distinct recognition and application to what is called the civil-law rule, without so naming it or mentioning the other rule.

In the first of them the following language was quoted and adopted from Addison on *Torts*, Woods' edition, page 95, viz.: "Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighboring lands. All lands, therefore, are of necessity burdened with the servitude of receiving and ⁵⁶⁰ discharging all waters which flow down to them from lands on a higher level, and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher land to the natural outflow and drainage of the soil, unless he has gained a right to pen back water by contract, grant, or prescription. So that if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain-water together at the bottom of his estate and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damages thereof caused to the possessor of the lower lands."

Judge Cooley, after noting the fact that some of the states apply the one rule and some the other, says that "no doubt all the states would recognize an exception (to the civil-law rule) in favor of the owner of a town lot, who must be at lib-

erty to cut off drainage across it, or his lot would be worthless for many purposes. In respect to agricultural lands, strong reasons may be given for either view, and it is probable that each will continue to find supporters hereafter as heretofore": *Cooley on Torts*, 577.

Elsewhere it is said: "In some states a distinction ⁵⁶¹ has been made between urban and rural property, and it has been held, or, at all events, an opinion has been expressed, that the rule of the civil law that the lower proprietor holds his land subject to the burden of receiving the surface water which naturally drains from the higher land, does not apply to city and village lots": 24 Am. & Eng. Ency. of Law, 915. In support of the last statement, the author cites cases from Alabama, Iowa, Michigan, and Pennsylvania (four of the states in which the civil-law rule prevails as to rural lands), and two cases from New York (one of the states in which the common-law rule prevails). In a later case from Iowa, however (*Waverly v. Page*, 105 Iowa, 225), the civil-law rule was applied in favor of the owner of a city lot, and that, too, as against the municipality itself; and the same rule seems to have been applied as to urban property in Georgia: *Goldsmith v. Elsas*, 53 Ga. 186; in Illinois: *Gormley v. Sanford*, 52 Ill. 159; in Kentucky: *Kemper v. Louisville*, 14 Bush, 87; in Louisiana: *Bowman v. New Orleans*, 27 La. Ann. 501; in Virginia: *Smith v. City Council of Alexandria*, 33 Gratt. 208, 36 Am. Rep. 788, and in other states.

We are unable to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors; and hence we do not think it ⁵⁶² wise to apply one rule to city lots and a different rule to agricultural lands, especially in the same state.

Having heretofore, in the three cases mentioned, determined the rights of adjacent rural proprietors by the civil-law rule, and still deeming that the better doctrine, we now apply it to urban lots, and in doing so overrule the first ground of demurrer.

As to the second ground of demurrer, it need only be said that the rightful occupant of a lot, whether he or she be owner in fee, life tenant, or lessee, if injured in his or her possession by the wrong of another, may recover damages for the injury done, that damages to be measured by the injury to his or her particular estate or interest in the property.

If it be true, as averred in the declaration, that the defendant wrongfully caused noxious vapors to rise on and from the plaintiff's lot, and that she was injured thereby, the defendant is liable therefor, the same as if such vapors had been wrongfully caused to rise on and from his own lot. Hence the third ground of demurrer is not well taken.

The remaining assignment of demurrer is likewise bad, because it was not incumbent on the plaintiff to aver in terms that the wrongs of the defendant were the natural and proximate cause of ⁵⁶³ her sickness. It was sufficient on this point to aver that the wrongful creation of the stagnant pond by the defendant caused the ill-health suffered by the plaintiff.

Reverse and remand.

SURFACE WATERS.—The owner of the higher of two adjoining tenements has an easement to have all waters falling or accumulating on his land discharged over the lower tenement to the same extent as they would be discharged in a state of nature: *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163. See, too, *Roulston v. Hall*, 66 Ark. 305, 74 Am. St. Rep. 97, and note.

DAMAGES—ACTION FOR BY OCCUPANT.—An action for damages for a nuisance may be maintained by one in possession for injury to his possessory interest, though he has no title: *Crommelin v. Cox*, 30 Ala. 318, 68 Am. Dec. 120. A lessee may maintain an action against one who has laid gaspipes in neighboring streets so imperfectly that they allow gas to escape through the ground into his well: *Sherman v. Fall River etc. Co.*, 2 Allen, 524, 79 Am. Dec. 799.

ON PROXIMATE CAUSE, see the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

CHATTANOOGA ELECTRIC RAILWAY CO. v. MINGLE.

[103 TENNESSEE, 667.]

RAILROADS—ELECTRIC—FALL OF ELECTRIC WIRE—PRESUMPTION OF NEGLIGENCE.—Where the guy wire of an electric railway company breaks and falls to the ground in a public street, even though such fall is caused by the stroke of a trolley, there arises a presumption of negligence on the part of the railway company, which, unless rebutted, entitles one who is injured thereby to recover.

AN ELECTRIC RAILWAY COMPANY MUST EXERCISE a high degree of care, both in the construction of its lines, and in their continued maintenance in a good and safe condition.

Brown & Spurlock, for the appellant.

S. B. Smith, for the appellee.

⁶⁶⁷ BEARD, J. The plaintiff in error operates a line or lines of electric railway in the city of ⁶⁶⁸ Chattanooga, with overhead trolley wires. The defendant in error, while riding a bicycle with due care, along one of the most used public streets of that city, suddenly found that he was about to run over a fallen guy wire of the electric company, and in endeavoring to avoid it, received a serious injury, to recover damages for which this suit was brought.

The case discloses that an approaching car, in some unexplained way, slipped its trolley, which, as it rose, struck this guy wire and broke it. On breaking, it fell to the ground immediately in front of the defendant in error. At the time of the accident the wire was carrying at least five hundred volts of electricity, an amount perilous to the life or limb of one who came in collision with it.

This being the entire case, upon submitting it in charge to the jury, the trial judge said that the rule of *res ipsa loquitur* applied, and if they were satisfied the injury to the plaintiff was the proximate result of the fallen wire, then there arose a presumption of negligence on the part of the defendant company, which, unless refuted, would entitle plaintiff to recover.

The trial having resulted in a verdict against the electric company, and its motion for a new trial being overruled, the case is presented to this court on an assignment of error in the foregoing instruction.

We agree with the counsel of plaintiff in error ⁶⁶⁹ that the rule is "that those who go on a highway may well be held to do so subject to their taking upon themselves the risk of injury from inevitable danger, where carelessness cannot be charged upon anyone."

But was the fall of a dangerously charged guy wire an inevitable danger? That it was unexpected is no doubt true; but many accidents occur from defective mechanical contrivances which, though not anticipated, are by no means inevitable, because they might have been avoided by the exercise of care corresponding with the danger attendant upon the contrivance. In the case at bar, the guy wire, charged as it was with a heavy electric current, was suspended over a street crowded with persons, passing at all times of the day, was intrinsically dangerous, yet the risk of accident therefrom was not inevitable. If the wire was made of good material and

was properly attached above and below, and then carefully supervised, there was no inevitable danger incident to its suspension above the street. If, however, the wire was imperfectly constructed or attached, or, if properly attached in the beginning, it was neglected for a period of time sufficiently long for expansion or strain upon it to weaken the attachments, then it did become a menace to the public, and the company, being guilty of the negligence which contributed to this condition, was responsible for the damage proximately resulting ⁶⁷⁰ therefrom. Such a wire is used as a brace to strengthen and hold in place the main wire or wires, and is put up not to fall, but to retain its safe level above the street. To accomplish the purpose of its erection, it was required to be heavy and strong enough to stand the force of the strain, as well as that of an ordinary blow. It is common experience that in propelling a car, the trolley will sometimes slip from the wire along which it is passing, and if in so doing it comes in contact with a guy wire, it is apparent that the latter should be of sufficient strength and fixity to withstand the violence of the stroke, and, if it fails to do so, it is not an unreasonable inference that there has been negligence in its selection, construction, or supervision. In view of the extreme peril consequent on the displacement and fall of the wires, and in the operation of an electric railway system, it is essential that a high degree of care be exercised, not only in their construction, but in their continued maintenance in a good and safe condition: *Denver etc. Co. v. Simpson*, 21 Colo. 371; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114.

If this be not done, then with the growing network of wires suspended over the streets of our towns and cities, those who use these streets in the exercise of a common right, will do so in constant peril.

Under these circumstances, we think no hardship ⁶⁷¹ is imposed upon the defendant, who is using this dangerous agency of electricity along overhead wires, when an accident occurs from a wire which has fallen to the street, or dangerously near it in requiring him to repel a presumption of negligence. Unless the rule of *res ipsa loquitur* is applied, it is evident in a large number of cases liability for the resulting injury will be escaped. It is within the power of the defendant at all times to show whether he has exercised due care in the selection of material, in their erection and subsequent supervision, while

to prove an actionable lack in these things would be, in most cases, practically beyond the reach of the party injured.

The rule laid down by the trial judge in this case has been applied frequently. *Kearney v. London etc. R. R. Co.*, L. R. 5 Q. B. 411, was an action to recover for an injury to one who, passing over a brick bridge, was struck by a brick falling from one of its piers. The bridge was three years old, and just before the injury in question a train had crossed it. In answer to the insistence that before he could recover the plaintiff must show acts of negligence, and that the dislodgment might have resulted from a change of temperature against which no foresight could have guarded, Cockburn, C. J., said: "It is true that it is possible that, from changes in the temperature, a brick might get ⁶⁷² into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care, applied to such a purpose, intervening in due time so as to prevent any accident. But inasmuch as our own experience of these things is that bricks do not fall out when brickwork is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of the brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that due care on the part of the defendant which it was their duty to apply."

It seems eminently proper that it should prevail, in view of what has been said, in a case like the present. In 2 Jaggard on Torts, section 864, the author says that proof of contact with a live wire and of damages resulting therefrom makes a complete case of prima facie negligence against the defendant, and in Crosswell on Electricity, section 249, it is said the mere fact that an electric wire sags or falls affords sufficient evidence of negligence. And such was the holding in *Uggla v. West End St. Ry. Co.*, 160 Mass. 354, 39 Am. St. Rep. 481, and *Snyder v. Wheeling Electric Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922.

We find no error in the record, and the judgment of the lower court is affirmed.

ELECTRIC COMPANIES—FALLEN WIRES.—If a wire charged with electricity falls from its place of elevation above a street to the surface of the street, and there comes in contact with a man

and kills him, the law raises a *prima facie* case of negligence: *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786.

ELECTRIC COMPANIES ARE BOUND TO USE SUCH CARE in the construction and maintenance of their lines and apparatus as a reasonable man would use under the circumstances, and when their wires carry a dangerous current of electricity, and the result of negligence may be the exposure of persons in the public streets to death or the most dangerous accidents, the highest degree of care is required: *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262; *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

EX PARTE BATTIS.

[40 TEXAS CRIMINAL REPORTS, 112.]

MUNICIPAL CORPORATIONS—ORDINANCE REGULATING VEHICLES.—A municipal ordinance providing that any person owning or using any street carriage, hack, or other vehicle for the purpose of conveying passengers, goods, or merchandise from one part of the city to the other for hire, or who shall stop, stand, or detain any such vehicle on certain streets, or in front of any public hotel in such city, except when actually engaged in receiving or delivering passengers, goods, or merchandise, shall be guilty of a misdemeanor, is unreasonable, and hence void.

MUNICIPAL CORPORATIONS HAVE POWER BY ORDINANCE to prevent the encumbering or obstructing of their streets, alleys, and highways by vehicles, and to that end can regulate their use, fix stands for vehicles, and permit them to use no other place as stands, but such power must be exercised in a reasonable and uniform manner.

W. Greeg, for the relator.

W. D. Williams, for the respondent.

113 HENDERSON, J. Relator was arrested for an alleged violation of a city ordinance, and sued out a writ of habeas corpus before the district judge, who, after hearing the evidence, remanded the prisoner, and he prosecutes this appeal.

The complaint is as follows: "In the name and by the authority of the city of Fort Worth. In the city court. Before the undersigned authority, this day personally appeared L. P. Moore, who, being duly sworn, upon oath deposes and says that on the seventeenth day of November, 1898, and before the

filing of this complaint, one Charles Battis, within the corporate limits of the city aforesaid, who was then and there using a certain street carriage and hack for the purpose of conveying passengers from one part of the city to another for hire, and who did then and there stop, stand, and detain such carriage and hack on Main street, of said city, when not actually engaged in receiving and delivering passengers and goods and merchandise, in violation of the ordinances of said city in such cases made and provided, contrary to the law of the state of Texas, and against the peace and dignity of the city of Fort Worth," etc.

The portions of the charter of the city of Fort Worth introduced in ¹¹⁴ evidence are as follows: Section 53 provides that the city council, among other things, shall have power "to prevent the encumbering of the streets, alleys, sidewalks, and public grounds with carriages, wagons, carts, hacks, buggies, or any vehicle whatsoever": Special Laws 1889, p. 76. Section 53a provides that the city council shall have power "to license, tax, and regulate hackmen, draymen, omnibus drivers, baggage wagon drivers, and drivers of vehicles of every kind, . . . and to regulate stands for vehicles," etc.: Special Laws 1891, p. 16. The ordinance passed by the city of Fort Worth under said provisions of the charter is as follows (chapter 7, article 55): "Any person or persons owning or using any street carriage, hack, or other vehicle for the purpose of conveying passengers, goods, wares, or merchandise from one part of the city of Fort Worth to another, for hire, who shall stop, stand or detain any such carriage, hack, or vehicle on Main or Houston streets, or upon any cross-streets running east and west between said Main and Houston streets, commencing with Weatherford street on the north and ending with Seventh street on the south, or in front of any public hotel in said city, except when actually engaged in receiving or delivering passengers, goods, wares, or merchandise, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than five nor more than twenty-five dollars," etc. Appellant proposed to introduce witnesses to show the conditions surrounding said streets constituting the locus in quo, in connection with his proposition that the ordinance in question was an unreasonable exercise of the power of said city. The court, however, refused to hear testimony on the subject. We think the bill is defective in fail-

ing to state the facts desired to be proved. So we will consider the question of the reasonableness of said ordinance on this phase, as presented by the charter and ordinance.

There is no question that the authority granted to the city by the legislature in its charter to regulate the use of the streets and alleys and public grounds and prevent the encumbering of the same by carriages, wagons, etc., is ample; that is, the legislature, in the charter, distinctly gave to the city of Fort Worth the power to regulate the use of the public streets, alleys, etc., by vehicles. "Where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid": See 1 Dillon on Municipal Corporations, sec. 328, note 1. It is contended here, however, that the ordinance in question, prohibiting the stopping of vehicles on said streets of Fort Worth for all purposes, except loading and unloading, is an unreasonable exercise of the power of the municipality, and is in excess of the charter right to regulate the use of said streets, and to prevent the encumbrance thereof. It is the general doctrine in this country that every ordinance of a corporation must be either authorized by the charter of such corporation or one of the incidental powers of the corporation which is implied; furthermore, that every by-law must be ¹¹⁵ reasonable, and the reasonability of a by-law is a subject to be passed on by the courts: 1 Dillon on Municipal Corporations, sec. 319, and authorities cited in note. It is held, furthermore, that the courts will be liberal in upholding an ordinance, and, if its reasonableness be doubtful, it will not be held void: *Ex parte Gregory*, 20 Tex. Cr. App. 210, 54 Am. Rep. 516. Ordinances, to be reasonable and lawful, must not be oppressive, must be impartial, fair, and generally may regulate, but not prohibit, matters of common right: 1 Dillon on Municipal Corporations, secs. 320-323, 325. Now, applying these rules to the above ordinance, does it appear that the same was a reasonable exercise of the power of the municipality under its charter? The ordinance in question, it will be noted, inhibits the stoppage of vehicles on said streets in the city of Fort Worth for any purpose, except to receive and discharge freight or passengers. Under it, no matter what the emergency might be, a person stopping a vehicle, outside of the exceptions, would violate the ordinance, and be subject to punishment. A great many exigencies might occur for a

person to stop a vehicle for the transportation of goods or passengers, which he might be driving, entirely reasonable; but, under the ordinance, if he delay but a moment, he would be subject to a fine. There can be no question that, under a proper ordinance, the municipality has authority to prevent the encumbering or obstruction of its streets, alleys, and highways by vehicles, and to that end can regulate their use, can fix stands for vehicles, and permit them to use no other place as stands. This would be a proper exercise of its power to regulate; but it occurs to us that the sweeping declaration in this ordinance, inhibiting the stoppage of vehicles for any purpose, outside of the exceptions mentioned, is oppressive, and is in contravention of common right, and so is unreasonable, and, in our opinion, is not authorized by the charter. We therefore hold the city ordinance void, and relator is ordered discharged.

Reversed and relator discharged.

Hurt, presiding judge, absent.

MUNICIPAL CORPORATIONS—REGULATING VEHICLES.—

An ordinance of a municipal corporation authorizing the depot marshal to prescribe the places where omnibuses, hacks, and other vehicles shall stand at a railroad depot, and requiring drivers to obey the directions of police officers in regard to such places, is valid: *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100; *St. Paul v. Smith*, 27 Minn. 364, 38 Am. Rep. 296. But see *Cosgrove v. Augusta*, 103 Ga. 835, 68 Am. St. Rep. 149. An ordinance of a city may regulate the use of the public streets by carriages of an unusually large size, and may prescribe the routes and streets on which certain lines of omnibuses may pass, the stands at which they may stop, and the times at which they may start from such stands: *Commonwealth v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679. See, too, *City Council v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95.

PAYNE v. STATE.

[40 TEXAS CRIMINAL REPORTS, 202.]

RAPE.—INSTRUCTIONS in a rape case presenting the theory of the prosecution as to the character of the force necessary under the facts proved to constitute the crime, predicated upon the testimony of the prosecutrix alone, but not referring in terms thereto, are not erroneous as being on the weight of the evidence.

RAPE—SLEEPING WOMAN—FORCE.—The act of copulation by a man with a woman, she being asleep at the time and not consenting, is sufficient force to constitute rape.

RAPE—SLEEPING WOMAN—WANT OF CONSENT.—The act of copulation by a man with a sleeping woman, "without" or "against" her consent, is sufficient to constitute rape, although the force used is only such as is necessary to the mere act of copulation.

APPELLATE PRACTICE—SETTING ASIDE JUDGMENT.—The judgment of the trial court must be affirmed on appeal, if there is direct conflict in the testimony, and there is sufficient testimony in the record to support the verdict.

J. E. Thomas, for the appellant.

R. A. John, assistant attorney general, for the state.

²⁰³ HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at imprisonment in the penitentiary for five years, and he prosecutes this appeal.

²⁰⁴ This case was before us at a former term of this court, on appeal from Callahan county: See *Payne v. State*, 38 Tex. Cr. Rep. 494, 70 Am. St. Rep. 757. The conviction in that case was for rape by fraud. The case was reversed because of a defect in the indictment, and because, in the opinion of the court, the evidence did not sustain the conviction for rape by fraud. A new indictment was found, alleging rape by force. The venue was transferred to Eastland county, and a trial and conviction were had, as before stated. The theory of the state is to the effect that the copulation occurred while the prosecutrix was asleep, and without her consent, or with any reason to believe that she was consenting to the act of copulation. The theory of the defendant was that he copulated with the prosecutrix, not only with her consent, but by her invitation.

Appellant insists that the court committed an error in giving the following charge to the jury: "If, from the evidence, you believe that the defendant did at the time and place alleged in the indictment, and without the consent of Jessie

Winn, with his (defendant's) private male organ penetrate the private female organ of the said Jessie Winn, and if you further believe that such penetration, if any, occurred at a time when the said Jessie Winn was asleep, and was without her knowledge, then in that event such penetration, if any, would, in law, be with force sufficient to constitute rape." Appellant insists that this was a charge on the weight of the evidence, in that it singled out the testimony of Mrs. Jessie Winn, and authorized the jury to find a verdict on her evidence alone, and that it substituted another character of force than was provided in the statute. With regard to the first proposition, it nowhere mentions the testimony of Jessie Winn, but, as we understand the charge, presents the theory of the state, predicated on the state's testimony as to the character of force necessary, under the circumstances, to constitute rape. If it be true that this theory is alone based on the testimony of Jessie Winn, we can see no harm in this. As to the second proposition, the question is sharply presented, Was it competent for the court to present or define the question of force as was here done? That is, the charge in effect instructed the jury that the act of copulation of a male person with a woman, she being asleep at the time, and not consenting, was sufficient force to constitute the offense of rape. Ordinarily, the statutory definition of force would be sufficient, but the facts in this case, so far as the state was concerned, raised the direct issue before the jury as to whether or not a rape could be committed on a woman while she was asleep, she not consenting to the act; and in such case it was entirely proper for the court to instruct the jury as to the required force under such circumstances, and the instruction given was in accord with the authorities on the subject: See *Mooney v. State*, 29 Tex. Cr. App. 257; *Commonwealth v. Burke*, 105 Mass. 376, 7 Am. Rep. 531; *People v. Bartow*, 1 Wheel. C. C. 378; *Walter v. People*, 50 Barb. 144; *Regina v. Young*, 14 Cox C. C. 114; *Rex v. Mayers*, 12 Cox C. C. 311; 1 Wharton's Criminal Law, sec. 561, p. 524, ²⁰⁵ and note. In *Mooney v. State*, 29 Tex. Cr. App. 257, this language is used: "The second position urged by the state is that, 'the woman being asleep when penetrated, rape is the result, though no greater force is used than that involved in the act.' We have given this proposition thorough examination. The authorities are quite inharmonious. Apparently, there is a serious conflict of opinion upon this sub-

ject, but, when carefully scrutinized, the conflict will be found, to a great extent, apparent only. Our researches lead us to these conclusions: If the statute defines rape to be carnal knowledge of a woman by force and 'without' her consent, then the proposition above stated is correct. On the other hand, if the statute defines rape to be the carnal knowledge of a woman by force and 'against' her consent, then the proposition is not correct. Some cases hold the proposition correct whether the statute says 'against' or 'without.' Counsel for appellant, however, insists that this question was not before the court in Mooney's case. We have examined the decision carefully, and we cannot agree to this. We are not inclined to make the distinction between the terms "without consent" and "against consent" as made in the above case, because we believe there is really, in effect, no difference between the expressions. Rape must be by force and without consent, as is stated by our statute, which really means the same thing as "against consent." If the female is asleep, of course she cannot give her express consent, but if she is willing to the act, there is tacit consent, and there need not be express consent; so that in the final analysis the act must be against her will and consent, and the force used is only such force as may be used in the act of copulation. We quote from the case of Regina v. Young, 14 Cox C. C. 114—a case very similar to this—as follows: "The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink, on the 2d of February, 1878, went to bed in her lodgings in the Seven Dials, with her youngest child, about 9 o'clock. Her husband, with another child, came home about midnight. About 4 o'clock in the morning, when all four were asleep, the prisoner entered the room—the door not having been locked—got into bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, she being at the time asleep. When she woke, at first, the prosecutrix thought that it was her husband; but on hearing the prisoner speak she looked around, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband. The prisoner ran away, but before he could make his escape he was secured by a police constable. None of the parties had ever seen the prisoner before. In answer to questions put by me, the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that

the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent. I put the last question to the jury in consequence of what fell from Denman, J., in *Regina v. Flattery* (1877), 2 Q. B. Div. 410-414, 13 Cox C. C. 388. Upon these ²⁰⁶ findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the court of criminal appeal, in *Regina v. Flattery*, 2 Q. B. Div. 410-414, 13 Cox C. C. 388, having expressed a desire that the case of *Regina v. Barrow* (1869), L. R. 1 Cr. Cas. 156, 28 L. J. M. C. 20, 11 Cox C. C. 191, should be reconsidered." Lord Coleridge, C. J., said: "We are all of opinion that the addition made by the learned baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape." It follows from these authorities that the court did not err in defining the force to be used on a woman when asleep, as was done. This was a presentation of the state's theory, predicated on its evidence. The court immediately instructed the jury on appellant's theory—that is, in his testimony it was insisted that he had the consent of the prosecutrix to the act of copulation; and the court, on this subject, gave the following instruction: "You are further charged, if you believe from the evidence that the said Jessie Winn, by acts or conduct toward the defendant which were reasonably calculated to induce the defendant to believe that he had the consent of the said Jessie Winn to have carnal connection with her, caused the defendant to believe that he had the consent of the said Jessie Winn to have such intercourse with her, and, so believing, the defendant had such carnal connection, if any, with the said Jessie Winn, you will acquit him." This instruction, given in connection with the former instruction and immediately following it, adequately presented appellant's theory of defense, and prevented any confusion or misconception in regard to the preceding charge, even if it be conceded that any misconception could result therefrom.

Appellant insists that this case should be reversed because the testimony is insufficient to support the verdict of the jury. In this regard it has been repeatedly held that we are not placed in the same position as the trial judge. He has the witnesses before him, hears their evidence, sees their manner and bearing, and is in a position to judge of the credibility of the witnesses, and to weigh the case upon its merits. When the cause comes before us, it comes with the approval of the trial judge, and the bare question to be considered by us is,

Is the testimony in the record sufficient to support the verdict? Judged by this rule, if we determine that there are enough facts in the case to have authorized the verdict, it is to be held sufficient. Looking to the record in this case, the testimony of the prosecutrix supports the verdict, and there are other facts in the record which tend to corroborate her. It is shown by the statement of facts that a dance or party occurred at the house of appellant's father on the night in question. It was a small house, containing but three rooms. A number of others besides the family remained through the night—among them, the prosecutrix and her husband; the prosecutrix being a niece of old man Payne, and the cousin of appellant. The dance was concluded about 12 o'clock, and the parties then went to bed. Prosecutrix and her husband, with two children, slept on a pallet near the north wall of the main room, while ²⁰⁷ appellant and three or four boys slept on a pallet near the east wall. The prosecutrix testified that about daylight "I was awakened by some man being on top of me and having carnal intercourse with me. I thought it was my husband, and spoke to him as such. I said to him, 'Why, George, what do you mean?' He made no reply, but kept on, and I again spoke to him and said: 'Don't! Don't! You hurt me. I'm all unwell.' He paid no attention to me, but kept on having carnal intercourse until he got through. He then got off of me and went off, crawling over the foot of the bed and out on the floor." She further states that this action attracted her attention, and she raised up, and saw appellant crawling off toward his pallet, on the south side of the room, which was about fifteen feet from her bed. She then roused her husband, and the family were also roused; and appellant's father came in with a rope and accused the boy of the act, and he denied it, and his father whipped him with the rope. Appellant himself testified that some time before daylight he was awakened by some one touching him on the breast; that it was the prosecutrix, but she said nothing to him, and immediately went back to her bed; that he immediately got up from his pallet and went over to her bed; that "she raised up, put her arms around my neck, kissed me, and pulled me down on her"; that nothing was said, but she put his penis in herself; that after he got through he went back to his pallet and went to sleep. He further states that he recognized prosecutrix, when she touched him, by the moonlight which was shining in at the window; that the reason he told his father that he had not done it was because he was afraid he would never quit whip-

ping him. He further states that he had never had intercourse with her before, and the reason he ventured to go over there and have intercourse with her, with her husband in bed with her, was because he did not fear him doing anything, even if he caught him in the act; that he did not think he would hurt him, or care much. It would seem from their testimony that upon the crucial points of the case their evidence is in sharp contradiction—both admitting the copulation; she testifying to nonconsent, and he testifying to her consent. So the case is narrowed down to a question of consent vel non. In addition to her testimony showing want of consent, there are certain features of his own testimony which appear to reinforce hers. If the parties had previously been familiar, it might appear reasonable that, even under the adverse circumstances then surrounding them, the prosecutrix might have sought appellant out, waked him up, and invited him to come over to her pallet, although her husband and two children were sleeping with her; but all previous familiarity between them is expressly denied by appellant. On the other hand, it would ordinarily be considered a rather daring adventure for appellant to have gotten up off his pallet and gone to her bed for the purpose of copulating with her, when her husband was lying almost in touch of them during the operation. Appellant, however, explains this by stating that he did not fear her husband doing anything to him, and did not think he would ²⁰⁸ care much. And so his own evidence equally suggests his conduct, whether he had reason to believe that the prosecutrix would or would not consent, as he did not stand in awe of her husband. If there was any evidence in the record showing that her husband was aroused and detected them in the act, and she then made outcry, this would weaken the case; but there is no such evidence, and, according to the testimony, immediate outcry was made. And in this connection we would look to the further fact that appellant says he recognized her by the light of the moon. The record shows that there was no moon on that night. In our opinion, the testimony is sufficient to uphold this conviction. There being no error in the record, the judgment is affirmed.

Davidson, presiding judge, absent.

RAPE—SLEEPING OR INSENSIBLE WOMAN.—If a man has, or attempts to have, connection with a woman while she is asleep, it is no defense that she does not resist, and he can be found guilty

of rape or of an attempt to commit rape: Notes to Don Moran v. People, 12 Am. Rep. 291; Smith v. State, 80 Am. Dec. 366, 367. See, too, Payne v. State, 38 Tex. Cr. Rep. 494, 70 Am. St. Rep. 757. So if a man has intercourse with a woman without her consent while she is, as he knows, wholly insensible, he is guilty of rape: Commonwealth v. Burke, 105 Mass. 376, 7 Am. Rep. 531. See, also, State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505.

APPEAL—CONFLICTING EVIDENCE.—THE VERDICT of a jury will not be disturbed on appeal, where the evidence is conflicting, if there is some evidence to support it, no matter what the appellate tribunal may think about the preponderance of the evidence: Frankfort v. Coleman, 19 Ind. App. 368, 65 Am. St. Rep. 412. See, also, McGregor v. Reid, 178 Ill. 464, 69 Am. St. Rep. 332.

GRIFFIN v. STATE.

[40 TEXAS CRIMINAL REPORTS, 312.]

HOMICIDE—EVIDENCE.—On a trial for murder, the testimony of a physician is not admissible to show that a blow inflicted by the accused on the head of the deceased would not have caused his death but for the inflamed condition of his brain, caused by the excessive use of intoxicating liquors. If such blow was the proximate cause of the death, the physical condition of the deceased at the time is immaterial.

HOMICIDE — EVIDENCE — DECLARATIONS AS RES GESTAE.—If, within a few minutes after the accused had struck a fatal blow with a beer glass, he, being much excited at the time, declared to the first persons that he met, while speaking of the deceased, that, "I hope that I haven't hurt him much," "I did not think that the glass was heavy enough to knock him down," "I just wanted to keep him from kicking me any more," such declarations are part of the *res gestae* and admissible as such.

CRIMINAL LAW—IMPROPER QUESTIONS.—Obviously improper questions calculated to elicit clearly inadmissible evidence, but which is not admitted, are not ground for the reversal of the judgment in a criminal case, unless it is clearly shown that the defendant was prejudiced thereby.

HOMICIDE—INSTRUCTIONS.—If it appears that a homicide was the result of a sudden quarrel, that the deceased struck the first blow, and that the defendant then threw a beer glass at the deceased, striking him on the head with fatal effect, the facts do not warrant a charge upon homicide inflicted in a cruel manner, or under circumstances showing an evil or cruel disposition.

HOMICIDE—INSTRUCTIONS.—If a homicide is committed upon a sudden quarrel and by the defendant throwing a beer glass at the deceased, with fatal effect, after first being struck by the latter, the jury must be instructed that if it believes that the weapon used was not likely to produce death, it cannot be presumed that death was designed, and that before conviction could be had of any degree of culpable homicide the jury must believe from the manner in which the weapon was used that it was evidently intended by the accused to take the life of the deceased.

R. A. John, assistant attorney general, for the state.

313 HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of six years, and he appeals.

The homicide occurred a few miles from the town of Victoria, at the saloon of Otto Fieks. It does not appear that there was any former grudge between the parties, and the meeting at this saloon was casual. A few weeks before the difficulty, deceased, Mauritz Hanboldt, lost his hat, and appellant found it. When they met in the saloon of Fieks, appellant asked deceased to give him a beer for finding his hat. Deceased informed him that he had already given a beer for that, and declined to give him another. The state's witnesses show that appellant immediately became boisterous, and used profane and abusive language. Defendant's witnesses, however, deny this. All agree that he immediately returned from the table where deceased was sitting, with another person, to the bar counter of the saloon, to drink a glass of beer. Deceased got up, and told appellant "to come here; he wanted to tell him something." Appellant came to him, and deceased took hold of him, and led him toward the door of the saloon, and appellant asked him what he wanted. He told him he wanted to show him something. Appellant appears to have pulled himself loose from deceased. Deceased, who was some stouter and heavier than appellant, then appears to have gotten in behind appellant; and according to appellant's witnesses, shoved and kicked him out of the saloon door, appellant having his glass of beer in his hand. Some of the state's witnesses say that they did not see this. Deceased's wife, who was on the outside, and a few yards from the saloon, sitting in a buggy, waiting for her husband, states that after appellant got out of the saloon she saw him pour the beer out of his glass, and then turned, and threw it. Other witnesses testify that the beer was not poured out of the glass, but the glass was thrown with the beer in it. It struck deceased in the head, a little above the left ear, and he fell on the saloon floor. In a short time he struggled to his feet, ran out of the saloon into a little field near by, was caught by his friends, and brought back, and placed in the buggy, and carried to the house of Fieks, where he died, from the effects of the wound, about 12 or 1 o'clock that night. Appellant, after he struck

deceased, returned to the saloon; and there is some controversy as to whether he attempted again to assault deceased, some of the witnesses testifying that he did, and others that he did not. He picked up some small weights that were near by, and went out of the saloon at another door, and in a short time went to a wagon near the saloon, and, with other parties, left. He surrendered to the sheriff the next day. We would observe that the witnesses who describe the wound state that there was no blood or break of the outer skin; that the wound showed in the shape of a half circle, as if inflicted with the bottom of a beer glass. The skull was not exposed, but from a superficial examination of the wound the physicians testified that the skull was fractured, and that the blow caused the death of deceased.

Appellant proposed to prove that deceased was addicted to the excessive ³¹⁴ use of alcoholic liquors, and was beastly and helplessly drunk two days before the killing. He states that this evidence was offered for the purpose and as preliminary to the testimony of Dr. Rape, who attended the deceased at the time of his death; and that he proposed to prove by him that, but for the inflamed condition of the brain, the blow inflicted would not have caused the death of deceased. The court explains this by stating that Dr. Rape testified in the case, and did not testify as stated in the bill of exceptions. The testimony, as offered, was excluded. In this we see no error. Even if the testimony of Dr. Rape had been to the effect that, but for the diseased condition of the brain, death might not have resulted from the blow, still there would have been no error in rejecting said testimony. The blow was the proximate cause of the death of deceased, and the enfeebled condition of deceased at the time would not be material. There was no suggestion here of any gross negligence on the part of deceased after receiving the blow, or of his attendants.

Appellant offered to prove by Wes Brown and Matthew Wyatt, who were present at the homicide, that they were at the wagon in which defendant and themselves left the scene of the difficulty; that, immediately upon defendant leaving the house where the blow was struck, he came to the wagon, and said to them: "I hope I haven't hurt him much. I did not think the glass was heavy enough to knock him down. I just wanted to keep him from kicking me any more." This was within five or six minutes after the blow had been struck, and while defendant was still very much excited and frightened

from the difficulty, and while the people in the house were surrounding deceased. The state objected to this, because it was not *res gestae*, but merely self-serving. The court, in his explanation to this bill, in refusing to admit the testimony, states that the declaration of defendant was made five or ten minutes after the difficulty, and after defendant had walked from the house to the wagon in the road, and after the wagon had been driven thirty or forty yards. Defendant and Wes Brown got into the wagon with the witness Matthew Wyatt, and that it was ten or fifteen minutes after the difficulty when defendant made said statement. Appellant further proposed to prove by himself the same expressions in regard to the difficulty as above set out, and that he was at the time very much excited and frightened from the difficulty, and that the wagon was not more than thirty feet from the house; and these were the first people he had mentioned the matter to; that this was about five minutes, or less, after the blow had been struck. This was objected to on the same ground, and the court appended to this bill no explanation. We are inclined to the view that this testimony was *res gestae*, and was admissible as such. In point of time it was very close to the difficulty. Appellant does not appear to have been engaged in any other matter, nor to have indulged in any conversation about any other subject. Almost immediately after the fatal blow was struck by him, and while he was still excited, before he left the place, he made the statement which was excluded. It does not occur ³¹⁵ to us that there was time for fabrication, nor is there any circumstance indicating that the statement was not the spontaneous expression of the witness (defendant), springing out of the transaction: *Smith v. State*, 21 Tex. Cr. App. 277; *Fulcher v. State*, 28 Tex. Cr. App. 465; *Chalk v. State*, 35 Tex. Cr. Rep. 116; *Underhill on Criminal Evidence*, sec. 95 et seq. True, appellant, in his testimony, stated these facts, but his evidence on this point was not given in *as res gestae*, but the mere statement of the fact, long after the homicide, after time for deliberation; and, of course, such testimony would not have the same force and effect with the jury as if it were a part and parcel of the transaction, springing out of it at the time. It appears a small matter that he was deprived of this testimony, yet it was a right to which he was entitled; and we cannot tell what effect its admission may have had with the jury.

Appellant, by his bill of exceptions No. 5, questions the action of the court permitting the district attorney to ask certain questions, suggesting that one Frank Jones had robbed deceased a short while before the homicide, and that said Jones was a cousin of defendant. This testimony was not admitted by the court, but the complaint is that the asking of the question, under the circumstances, was calculated to injuriously affect the defendant with the jury. We believe that the testimony was clearly inadmissible, and that the questions calculated to elicit it were obviously improper, and should not have been asked. While this is true, we would not be willing to reverse the judgment alone on this ground.

Appellant excepted to the action of the court in giving the following charge: "Where the circumstances attending the homicide show evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not, in their nature, be such as to produce death ordinarily." This was objected to, and the charge was also objected to because the court erred in not charging the jury fully on the question of his intent to kill deceased. We do not see, in this case, any evidence that the homicide was inflicted in a cruel manner, or under circumstances showing an evil or cruel disposition. It was a sudden quarrel, in which it appears that deceased struck the first blow. He shoved and kicked defendant out of the saloon. The defendant immediately turned, and threw a beer glass, which he had in his hand, at the deceased, striking him on the head, inflicting a wound from which he died. This was what occurred, and we fail to see in the testimony any evidence indicating an evil or cruel disposition, unless any killing which may occur in a casual difficulty indicates such cruel or evil disposition. We do not believe the court should have charged on this subject. The real keynote in this case was appellant's intention to kill. The court gave in charge to the jury article 717 of the Penal Code on this subject, but we believe the learned judge should have proceeded further than merely to give the statute in the abstract form, and should have applied the law embodied in such statute to the facts of ³¹⁶ this case, and instructed the jury pointedly that, if they believed the weapon used was not likely to produce death, the jury could not presume that death was designed; and that, before they could convict appellant of either murder or man-

slaughter, they must believe from the manner in which said weapon was used, it was evidently intended by appellant to take the life of deceased: *Shaw v. State*, 34 Tex. Cr. Rep. 435; *Honeywell v. State*, 40 Tex. Cr. Rep. 199. We furthermore believe that the court's charge on manslaughter should have been directly addressed to the facts proved. The statute makes an assault inflicting pain or bloodshed adequate cause. The evidence here showed that deceased did assault appellant by shoving and kicking him out of the saloon. The court charged generally that anything which was adequate cause to produce anger, etc., was adequate cause; but the salient fact in this case suggesting adequate cause was the assault of deceased on appellant, and the court should have predicated a charge of manslaughter on the facts proved on this subject. For the errors discussed, the judgment is reversed, and the cause remanded.

Davidson, presiding judge, absent.

CRIMINAL LAW—RES GESTAE.—The motive, character, and purpose of an act are frequently indicated by what is said by the person doing the act at the time. Such statements are the *res gestae* and are admissible as evidence in criminal prosecutions. Upon the trial of a prisoner for murder, a statement made by him a few minutes after the homicide, near the place and in the presence of eye-witnesses of the killing, is admissible in his favor as part of the *res gestae*: See the monographic note to *People v. Vernon*, 95 Am. Dec. 63, 68. Compare *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681; *Lynch v. State*, 24 Tex. App. 350, 5 Am. St. Rep. 888.

HOMICIDE—INTENT—MALICE.—If a man, without provocation, throws a beer glass at his wife, which strikes a lamp, breaking it and causing it to take fire and fatally burn her, there being others in the room, it is immaterial whom he intends to strike, or whether he has any specific intent, but the act shows an abandoned and malignant heart, and malice is implied: *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698.

HOMICIDE—CAUSE OF DEATH.—It is said in *State v. Landgraf*, 95 Mo. 97, 6 Am. St. Rep. 26, and *Sharp v. State*, 51 Ark. 147, 14 Am. St. Rep. 27, that if a person inflicts a wound with a deadly weapon in such a manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result.

EX PARTE WARFIELD.

[40 TEXAS CRIMINAL REPORTS, 413.]

HABEAS CORPUS—JURISDICTION.—The court of criminal appeals of Texas has jurisdiction to issue writs of habeas corpus on account of contempt proceedings before district courts in the trial of civil cases.

HABEAS CORPUS—JURISDICTION.—The court of criminal appeals of Texas can interfere by habeas corpus in contempt proceedings only when it clearly appears that the action of the lower court punishing for the contempt was without authority of law, and absolutely void because such court had no jurisdiction of the subject matter or the parties, or was wholly without power to make the order in that particular case.

CONTEMPT—VIOLATION OF INJUNCTION.—If the court has authority to grant the writ of injunction, no matter what irregularities may attend the granting thereof, or however erroneously the court may have acted in granting it, so long as the injunction exists, it must be obeyed, and, for a violation thereof, the party violating it must be held in contempt.

INJUNCTIONS—JURISDICTION.—Courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance, if the party shows himself entitled to the writ under equity rules, and if a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act done or threatened during the litigation, whether this has regard to property in issue or some personal right dependent on some personal act or conduct, the court may grant the writ.

INJUNCTIONS—JURISDICTION.—In actions purely legal, of which courts of law have exclusive cognizance, there is no jurisdiction to issue a writ of injunction.

INJUNCTION—JURISDICTION.—In cases where it is doubtful whether the action is one at law or of equitable cognizance, as a general rule, if the case is brought into an equity court, the chancellor has the same power to issue a writ of injunction as if there was no question of jurisdiction, and as long as the writ continues it must be obeyed, and its disobedience is a contempt.

INJUNCTIONS—ALIENATION OF WIFE'S AFFECTIONS.—In an action for damages for the partial alienation of a wife's affections, an injunction may be granted to prevent the defendant, who is exercising undue influence over such wife, and who, if not restrained, is likely to lead her entirely astray, from writing to, speaking to, or talking with her, or from visiting the house where such wife is staying.

INJUNCTIONS—VIOLATION—ALIENATION OF WIFE'S AFFECTIONS.—If, in an action for damages for a partial alienation of a wife's affections, an injunction has been granted restraining the defendant from writing or speaking to such wife, it is a violation thereof for such defendant to have a conversation with such wife, even though it is not shown that such conversation was of such character as to persuade or lead her away from her husband.

Crawford & Crawford, for the relator.

G. H. Plowman and R. A. John, assistant attorney general, for the respondent.

419 HENDERSON, J. This is an original application for a writ of habeas corpus, which grew out of contempt proceedings in the forty-fourth judicial district court of Dallas county. It appears that Will R. Morris, as plaintiff, brought a suit against J. B. Warfield, as defendant, before Judge Richard Morgan, in the forty-fourth judicial district court of Texas, for one hundred thousand dollars. The petition alleges a number of acts on the part of J. B. Warfield, the defendant in that suit, interfering with marital relations existing between Will R. Morris and his wife, Vivia Morris, said acts causing a partial alienation of the affections of his said wife; and further suggesting that the course of conduct of said Warfield toward the wife of said Morris, if permitted to continue unrestrained, would likely culminate in the total alienation of the affections of his said wife, and the destruction of the marital relations existing between them. And said Morris asked for a writ of injunction restraining said Warfield from visiting or associating with plaintiff's said wife, or going to or near her at a certain house, No. 129 Marion street, or any other house or place in the city of Dallas, or state of Texas, where his said wife might be, and that he be restrained from writing or speaking to her, or in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol, and also asking that his agents and employes be restrained from the like, etc.; and that said Warfield and his agents and servants be restrained from interfering with **420** plaintiff in his peaceful efforts to seek, talk, write, or communicate with his said wife, etc. The writ was granted on the 23d of February, 1899, and was served on Warfield on the following day, the 24th of February. On the 9th of March following, plaintiff sued out an attachment against said Warfield, alleging that he had violated said writ of injunction, and made a motion for rule against him for contempt for a violation thereof. Subsequently Warfield was brought before the court, and the matter of said contempt was tried before the Hon. Richard Morgan. A number of legal questions were raised, and the issue of fact was submitted before said judge as to whether or not said injunction had been violated. It was shown, in fact it was conceded by said Warfield, that on two occasions after the issuance and service of the said writ of injunction, he had met and talked

with the wife of Morris. He claimed, however, that these meetings were casual, and that he indulged in no conversation with her violative of the spirit of said injunction, or calculated to make a breach of the marital relations existing between Morris and his wife. It is further shown that he went to the house, 129 Marion street, where the wife of plaintiff, Morris, was, but claimed that he had the right to go there, that being his boarding-house, etc. A number of affidavits are filed pro and con, which it is not necessary to consider. The court, Judge Morgan presiding, adjudged Warfield in contempt of court, and assessed a fine against him of one hundred dollars, and three days' imprisonment in the county jail. From which judgment Warfield, the defendant in said proceeding and the applicant here, sued out a writ of habeas corpus; and he claims now, as he did before the lower court, that the court, in granting said writ of injunction, had no power or authority to enjoin him from speaking to, or talking with, Mrs. Morris, or from visiting the house, 129 Marion street; that the exercise of said power was beyond the jurisdiction of a court of equity, and was not merely irregular, but void, and imposed upon him no duty to obey the same. And he now insists that the use of said power by the court was violative of the constitution and the fundamental law of the land, in that it was an effort on the part of the court to restrain the freedom of speech and of locomotion, and the rights of the defendant in the pursuit of happiness. Furthermore, it is contended that, although the matters complained about might be regarded as a violation of the letter of the injunction, it was not a violation of its spirit, and the court had no power to coin a criminal offense out of the acts of the applicant, and to punish him as for a contempt. On the other hand, it is contended, on the part of the respondent, that the granting of the writ of injunction was not void, but, at the most, could only be considered improvident or irregular; that the court below had jurisdiction of the subject matter and all the parties; and that, it not being the void exercise of power, this court cannot take jurisdiction by virtue of the writ of habeas corpus.

There is no question that this court has authority to issue writs of habeas corpus on account of contempt proceedings before district courts in the trial of civil cases: See *Ex parte Degener*, 30 Tex. Cr. App. 421 566; *Ex parte Tinsley*, 37 Tex. Cr. Rep. 517, 66 Am. St. Rep. 818. While this court is thus placed by our constitution and laws in the attitude of super-

vising the action of civil tribunals in matters of contempt through the writ of habeas corpus, it fully recognizes the delicacy of its position, and it will exercise its functions with due care, and will only interfere where it clearly appears that the action of the tribunal punishing for contempt was without authority of law—that is, not merely irregular or erroneous, but absolutely void—because the court was without jurisdiction of the subject matter or the parties, or was wholly without power to make the order in the particular case which it did make. We will pursue this course, because we understand it to be the law, and because we will not permit the writ of habeas corpus to be used to interfere with the power and authority of the courts to properly administer the law. And no more vital power exists in the exercise of the authority of courts than to punish for contempts; in fact, it is the bedrock and essence of the authority and power of courts.

At the outset, we lay down this proposition: That wherever the court has authority to grant the writ of injunction, no matter what irregularities may attend the granting thereof, or however erroneously the court may have acted in granting the same, as long as the injunction exists, undissolved, it must be obeyed, and for a violation thereof the party will be held in contempt: 2 High on Injunctions, secs. 1416-1418. If, however, the court has no jurisdiction over the subject matter involved, or if it has exceeded its power, by granting an injunction in a matter beyond its jurisdiction, the injunction will be treated as absolutely void, and defendants in such case cannot be punished for contempt for its alleged violation: 2 High on Injunctions, sec. 1425. The power of courts of equity to grant writs of injunction has a wide range of subjects. Courts and text-writers have sometimes attempted to enumerate them, but we believe that the matter is of such a character as to escape designation; and, where the attempt has been made, the text-books say that it would indeed be difficult to enumerate all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court administers it by means of the writ of injunction: See 1 Spelling's Extraordinary Relief, sec. 5. Indeed, the interposition of courts of equity by restraining orders is a matter of growth, and keeps pace with advancing civilization, and courts are continually finding new subjects for the interposition of equitable relief by writs of injunction. Formerly, it

seemed to be the rule that courts would only interfere where some property right or interest was involved; but now it seems the writ will be applied to an innumerable variety of cases, in which really no property right is involved. While in some of the cases the courts appear to adhere to the old rule, yet when we look at the case it is difficult to see any question of property right, but a vain endeavor on the part of the court to adhere to the old doctrine, while it reaches out for the protection of some personal right. In the note to *Chappell v. Stewart*, 82 Md. 323, 51 Am. St. Rep. 476, reported in 37 L. R. ⁴²² Ann. 783, the learned annotator attempts to classify the cases where courts have interfered for protection of merely personal rights as rights relating to physical life, and rights relating to the intellectual, moral, and emotional life, and we refer to the cases embraced in the note to said case. We quote from the conclusion of the annotator, as follows: "The variety of cases above referred to, in which personal rights are really protected by courts of equity, shows that, while it is a commonly accepted theory that their jurisdiction must rest upon rights of property, there are, at least, many exceptions to the rule, among them, cases of contract, trust, or breach of confidence, relating to personal rights, cases respecting the education and custody of children, and cases relating to privacy and reputation, such as those restraining the publication or exhibition of photographs or other representations of persons, and the publication of private letters. In addition to this are the cases relating to the security of the person and the protection of health and physical comfort. While, in many of these cases, the jurisdiction is nominally based on an alleged property right, it is plain that the observance of the rule that equity will be limited to rights of property is little more than nominal. In all this class of cases equity does concern itself about personal rights as the real subject of consideration. England relieved its courts of equity from any necessity for searching for rights of property on which to base its jurisdiction by act of 1873, section 25, subdivision 8, which gave power to grant an injunction in all cases in which it shall appear to the court to be just that such order should be made. Under such a statute, the English courts are entirely free to grant injunctions to protect personal rights, including the right of reputation, and injunctions against libels are in fact granted." Under this increased exercise of power, courts of equity grant injunctions to restrain one set of employes or servants of a railroad com-

pany from interfering with or molesting another set of employés, especially where the road is in the hands of a receiver: See *In re Wabash Ry. Co.*, 24 Fed. Rep. 217; *United States v. Debs*, 64 Fed. Rep. 724. And so one who has learned the business secrets of another by virtue of his employment will be restrained from interfering with the business of such former employer by writing letters, soliciting trade, etc.: See *Loven v. People*, 158 Ill. 159. And equity will interfere to restrain a husband from interfering with a wife or children after an agreed separation: *Sanders v. Rodway*, 16 Beav. 207; *Swift v. Swift*, 34 Beav. 266; *Hamilton v. Hector*, L. R. 6 Ch. App. 701; *Aymar v. Roff*, 3 Johns. Ch. 48, 49.

While equity will interfere in matters of contract involving personal services, a distinction is taken between affirmative and negative stipulations. Equity will not compel a servant to perform an act, but will restrain that servant from performing a negative stipulation, or some act negative in its character, involved or implied in the affirmative stipulation: See 1 *Spelling's Extraordinary Relief*, sec. 11; 2 *High on Injunctions*, secs. 1164, 1165. Under this authority, it has been held that where an opera singer or ⁴²³ actor has contracted to sing or play for plaintiff at his theater, and nowhere else, without his permission, an injunction will be granted to restrain the party from singing elsewhere; the court thus preventing a breach of the negative covenant, although it cannot specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff: See *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Daly v. Smith*, 38 N. Y. Super. Ct. 158. And see other authorities cited in 2 *High on Injunctions*, 902, note 2. From these cases will be seen somewhat of the growth and application of the modern doctrine of equity in granting writs of injunction. We might cite a number of other cases illustrative of this view, but do not deem it necessary. If we refer to the modern cases (especially under liberal statutes on the subject of granting writs of injunction), the old doctrine of the freedom of speech and of the press, and that courts will only punish after an act which is violative of one or the other, appears to be overthrown in England, as we have seen, by statute. And see *Kitcat v. Sharp*, 52 L. J. Ch. 134. Our statute, as we shall hereafter see, is as liberal as the English statute on the same subject. So, the cases of *People v. Durrant*, 116 Cal. 179, and *Association v. Boogher* (Mo. App., Dec. 1876), 4 Cent. L. J. 40, would seem to have no application.

Now, we come back to the question as to whether or not, under the modern equity doctrine on the subject of granting writs of injunction, the action of the court here complained of was absolutely void. In *Ex parte Wimberly*, 57 Miss. 437, the distinction between the doctrine of void and voidable writs of injunction is very well put. That was a case of a contested election. The contestant sued the contestee for the office of county clerk. In that state a peculiar statute provided that such a contest should be tried before a justice of the peace and a jury; that an appeal should lie therefrom to the circuit court; but that the appeal should not operate as a supersedeas. The contestant was enjoined from prosecuting his suit on the grounds alleged—that the justice of the peace before whom the case was to be tried was a political supporter and a bitter partisan of the relator; that the constable of the court was his brother, and that a judgment in his favor would be rendered without regard to the merits of the contest; and that, if not allowed to enjoin the proceeding, the relator would be permitted to enjoy the office for a period of five or six months, to which he had not been elected. An injunction was granted, but it was disregarded, and the suit before the justice prosecuted to its termination. The parties were attached for contempt, and the court adjudged them guilty of contempt, and they sued out a writ of habeas corpus on the ground that the writ was void. The court, in discussing the question of jurisdiction or want of power in the court to grant the writ, uses the following language: “The want of jurisdiction here referred to is something widely different from the sense in which the words are used when we say that a court of law has no jurisdiction to settle a partnership account, or that a court of equity cannot entertain a suit sounding wholly in damages, because ⁴²⁴ it frequently admits of doubt in the inception of a litigation whether the particular suit before the court should not have been instituted in some other tribunal; and while the court is considering this question, and evolving the facts necessary to its determination, its authority must be respected and its orders obeyed. When we say that a person may safely disobey the commands of a court which is without jurisdiction to issue them, we mean either that it has failed to give, or is incapable for some reason of giving, legal notice to the person whose rights are to be affected, or that the subject matter of the controversy is one which that court has no right to consider in any aspect whatever. Thus, if a court of

law should assume jurisdiction of a suit for divorce, and issue an order for alimony pendente lite, the person against whom it was entered might safely disregard it. So, if a court of chancery should undertake to interfere in any way with a criminal prosecution, or to enjoin a convicted person from asking for an executive pardon, its action would be utterly null, and might be so treated by everyone. These illustrations enable us to appreciate the difference between that class of cases where there may or may not be jurisdiction, according as a full development of the facts may show that relief is to be sought in the one forum or the other, and where, consequently, it is the duty of the court first applied to to have the facts developed, with a view of determining the question of jurisdiction, and that other class of cases where it is at once perceived, from a mere mention of the subject matter of controversy, that no condition of facts can give jurisdiction. In the one case the orders of the court must be respected. In the other they must be treated as the impotent commands of a private person masquerading in the guise of judicial authority." And the court, further proceeding, uses this language: "But the bill for an injunction in this case did not seek to draw to the chancery court a settlement of the questions involved in the proceedings before the justice, but only asked, for special reasons, that those proceedings might be temporarily stayed. Conceding then, that a court of chancery cannot try a contested election case, may it enjoin a trial of such a case by the tribunal which alone has authority to try it? The power of the chancery court to enjoin actions at law is ancient and indisputable; and hence it is argued that, as it has this power, it must necessarily have authority to determine whether a particular action should be enjoined or not," etc., or, at most, whether it was only improvidently or wickedly granted. "But a very different question is presented when the issue is not whether the court has authority to enjoin the special action at law complained of, but whether it can enjoin any action whatever belonging to a general class of actions; for, while it is true that most actions at law may be enjoined, there are large classes of them as to which no state of facts will justify the interposition of a court of equity." And then cites, as an illustration, that the prosecution of any criminal case will not be enjoined, quoting from Story's Equity Jurisprudence, section 893; and then proceeds to show that under no circumstance, under the statutes of Mississippi, prescribing the

mode of contesting ⁴²⁵ elections, can the court of chancery try such election cases, and holds that it cannot enjoin the trial of the same in a tribunal authorized to try such cases by law. The same view with reference to contesting elections and granting of injunctions by courts is taken in Illinois: See *Andrews v. Knox County*, 70 Ill. 65; *Dickey v. Reed*, 78 Ill. 261. In regard to this matter we quote from the latter case, as follows: "To the complete authority to so act [that is, to issue writs of injunction] there are several things which are indispensable to enable the court to hear, determine, and decree. There must be a complainant. He must file a bill alleging the facts, showing that he has an interest in the matter in litigation, or, at least, to complain and have relief for others. There must be a matter to which rights are claimed, and that matter must be within the power of the court, when properly before it, to act upon or control it by its sentence, before it can adjudge and decree that parties shall be restrained from acting in reference to the thing in litigation. If any of these essential requirements is wanting, the court cannot decree that the restraining order shall issue."

We deduce from the foregoing authorities, and others that might be cited, these propositions: 1. That courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance, where the party shows himself entitled to the issuance of the writ under the well-known rules of equity. As ancillary to this, that the growth of the principles of equity in this regard have been greatly enlarged, so that it may be said that where a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon some personal act or conduct, the court will grant the writ. In such case, it cannot be said that the court lacks the power, although, in doubtful cases, it may refrain from the exercise of such power. 2. That in actions purely legal, of which the law courts have exclusive cognizance, there is no authority to issue a writ of injunction. 3. In a case (and there have been many such) where it is doubtful whether the action is one at law or of equitable cognizance, as a general rule, where the case is brought in an equity court, the chancellor has the same power to issue the writ as if there was no question of the jurisdiction, and as long as the writ continues it must be obeyed.

So far we have spoken of the matter as if the jurisdictions were entirely separate, as is the case in England and in most of our states. But in Texas we have a blended system of law and equity, there being but one jurisdiction for both, and, by a stronger reason, the writ of injunction will be authorized in a doubtful case.

Now, recurring to the subject matter of this litigation, as set forth in plaintiff's petition, we think there can be no question that appellant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. "He ⁴²⁶ is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie": See 2 Lawson's Rights, Remedies, and Practice, sec. 714. "It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family: 2 Lawson's Rights, Remedies, and Practice, sec. 715; Schouler on Domestic Relations, sec. 41; Bennett v. Smith, 21 Barb. 439; Barnes v. Allen, 30 Barb. 663. A husband, from time immemorial, has an interest in the services of his wife, springing from the marital relation. In this state, suits for personal injuries to her must be maintained by the husband predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife, and it was averred that, on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plaintiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff: and it would seem that, if the court had the power to maintain this suit for damages on account of the partial alienation of the affections of his said wife, he would have a right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affec-

tions and the utter destruction of the marital agreement. We believe this would be so under the liberal rules of equity, as now practiced in the courts, but much more so under the provisions of our statute on the subject of injunctions. Article 2989 of the Revised Statutes provides that the judges of the district courts may grant writs of injunctions in the following cases: "1. Where it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the appellant." This provision shows that it was intended to be broader than the ordinary authority, because, in the third subdivision of the act, the court is authorized to grant the writ in all other cases where the applicant for said writ may show himself entitled thereto under the principles of equity. For a construction of these provisions, see the able opinion of Judge Denman of the supreme court in *Sumner v. Crawford*, 91 Tex. 129. After reciting the provisions of the statute, the learned judge uses this language: "It will be observed that the latter portion of the article requires the case to be brought within the rules of equity, and does not undertake to state the circumstances entitling the applicant to the writ, and therefore, under it, it must appear that there is no 'adequate remedy at law,' as that term has always been understood. But the first portion of the article ⁴²⁷ does state what facts will justify the issuance of the writ thereunder, and does not require that there shall be no adequate remedy at law." And we would further suggest that the question decided in said case is very much in point in this case, as showing the liberality of our courts in granting writs of injunction. The court below, it will be conceded, had jurisdiction and authority to maintain the suit, and it cannot be seriously questioned that the principal object of the suit was to preserve the marital relations existing between plaintiff and his spouse, and to conserve, as far as may be, and rehabilitate, her affections for the plaintiff. It was claimed, by the continued conduct and interferences of the defendant in that suit, that the integrity of the marital relation was threatened, and, if his course of conduct was suffered to continue, that the marital relation would be destroyed. Among other things, it was alleged that said defendant exercised an undue influence over the wife of plaintiff, and, if suffered to associate with her and speak and talk with her, and visit her, it was very likely he would entirely corrupt and lead her astray, and therefore the power of the court was

invoked to arrest these interferences, and defendant was enjoined from speaking or talking with her, or visiting the house where she was staying. It occurs to us, if the suit itself was maintainable, that the acts complained of were prejudicial to the plaintiff; indeed, that by their continuation the real object of the suit would be entirely frustrated; and that the court consequently had the power and authority to inhibit said defendant from interfering with plaintiff's wife, and that this was no interference with the inalienable rights of the citizen to go where he pleased, and to associate with whom he pleased, and to pursue his own happiness in his appointed way, provided such course of conduct did not interfere with another's right. "He had a perfect right to so use his own as not to abuse another's." Nor is there any inconsistency, when thus construed, between the freedom of speech and of the press and the integrity of the marital relation. The law is as much bound to protect the one as the other, and, when both can be construed in harmony, it is the duty of the courts to protect both.

It has been said that applicant was not shown to have violated the spirit of the injunction, inasmuch as no conversation was shown of a character calculated to persuade or lead away the wife of the plaintiff; but his conduct was certainly in violation of the letter of said injunction, and we cannot say that the court did not have the right and authority to make the injunction as broad as it did, as, under the allegations of the petition, it is shown that defendant was not to be trusted in the society of Mrs. Morris, or to speak with her.

But, even if it be conceded that the act of the court in this regard is of doubtful validity—that is, that it may or may not be void—still we do not feel inclined to interfere. The defendant in that suit had his right to invoke the action of that court to dissolve that injunction. He did not do so, but he saw fit to willfully disregard it, and he now claims ⁴²⁸ before this court that the same was absolutely void, and that he had the right to defy it and set it at naught. It occurs to us that the injunction could have been easily obeyed, without infringing upon any of the fundamental rights of the applicant. We accordingly hold that the applicant does not show himself entitled to be relieved. It is therefore ordered that he be remanded to the custody of the sheriff of Dallas county, and undergo the sentence imposed upon him by the judge of the

forty-fourth judicial district court. It is further ordered that the costs incurred in this court be taxed against the applicant.

Relator remanded to custody.

HABEAS CORPUS—CONTEMPT.—One adjudged guilty of contempt and imprisoned is not entitled to release upon habeas corpus, unless the proceedings under which he is imprisoned are void: *Ex parte Keeler*, 45 S. C. 537, 55 Am. St. Rep. 785. Inquiry on habeas corpus into the commitment of a prisoner for contempt is confined to the determination whether or not the court had jurisdiction: *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263. See, further, the monographic note to *Mullin v. People*, 22 Am. St. Rep. 422.

CONTEMPT—IRREGULAR ORDER.—If a court has jurisdiction in the matter of making an order, and the order as made is irregular or improper in some mere matter of detail, it is still obligatory upon the party against whom it is issued until set aside or reversed by an appellate court, and he may be punished for contempt for disobeying or resisting such order: *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435.

CONTEMPT.—VIOLATING AN INJUNCTION renders a party guilty of contempt: *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173.

INJUNCTIONS—JURISDICTION TO ISSUE.—Equity will not interfere by injunction except to protect property rights: *Chappell v. Stewart*, 82 Md. 323, 51 Am. St. Rep. 476. Compare *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678; *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, and cases cited in note thereto.

AIRHART v. STATE.¹

[40 TEXAS CRIMINAL REPORTS, 470.]

HOMICIDE — PROVOKING DIFFICULTY — SELF-DEFENSE.—In order to have provoked the difficulty, the defendant, charged with murder, must have willingly and knowingly have used some language or have done some act after meeting his antagonist reasonably calculated to lead to an affray or deadly conflict, and unless such act was clearly calculated and intended to have such effect, the right of self-defense is not compromised, even though the defendant armed himself and went there for the purpose of a difficulty.

Gossett & Young and L. R. Stroud, for the appellant.

M. Trice, assistant attorney general, for the state.

⁴⁷⁰ **HENDERSON, J.** Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

In the view we take of this case, it is only necessary to notice the exceptions to the charge of the court on self-defense, in connection with a charge on provoking the difficulty. In order to a proper understanding ⁴⁷¹ of the court's charge on this subject, we will state substantially the case as presented by the testimony. The testimony shows that deceased and appellant both lived at or near the town of Kemp, in Kaufman county; that a few days before the homicide deceased had used some abusive language with reference to defendant, in his absence. It is shown that the trouble grew up between them in reference to an election of one of the precinct officers, and that deceased told several parties that on the Saturday before the homicide he met defendant and told him that he was a "son of a bitch," or a "damn son of a bitch," and that "he took it like a man." Defendant was informed of this on the same day, or a day or two afterward. On the succeeding Wednesday appellant, some time in the evening, approached deceased, who was sitting or standing near his brother, Joe Keith, and another party, stating that he wanted to see him. Deceased made no reply to this, and appellant repeated his request. Deceased went out to where he was, when appellant asked him if he used the language about him that he had heard. Deceased said that he had, and that he would say to his face what he had said to his back. So far we do not believe there is any controversy between the state's witnesses and the defendant's witnesses. Some of the state's witnesses testified that at this juncture deceased advanced a step or two toward appellant, and appellant stepped back, and immediately drew his pistol and fired at deceased. Deceased was in the act of turning from defendant at the first shot, and turned and retreated, and defendant fired on him three times after he retreated. Further than merely advancing on appellant, the state's witnesses indicate no hostile demonstration on the part of deceased. Some of them state that he had his left hand twirling his mustache, while his right was hanging by his side. Some of the defendant's witnesses, however, state that he had his right hand in the neighborhood of his right pants pocket. None of them, however, except the defendant himself, suggest that he ran his hand into his pocket. Defendant himself testified that when deceased advanced on him he put his hand in his pocket. We quote from the defendant's testimony on this point as follows: "After appellant had called deceased out in

the street, he said: 'Tra, what about this talk you have been making about me?' And he said, 'What about it?' And I said, 'That talk that you made to Bill Grubbs. He said you told him you cussed me out, and called me a God damn son of a bitch right up to my teeth, and I took it like a man.' And Keith said, 'God damn you! you are one.' And when he said it he stepped toward me just one step, and I stepped back just one step, and he said, 'I called you that, and, God damn you! you are one.' And he started toward me, and I stepped back and told him to stand back two or three times, and he kept advancing on me. When we first went out in the street he had his left side just a little bit to me, and had his right hand on his right pants pocket, and was trying to work something out of his pocket with his fingers; and when he called me a damn son of a bitch he run that hand right square in his pocket, and I drew my pistol and fired as fast as I could shoot." Appellant also stated that Frank McKinney had told him on the 472 preceding Sunday that deceased said he was a son of a bitch, and that he was going to kill him "before next Saturday." Appellant also testified that he went to see deceased in order to get him to explain himself and to take back what he said, if he said it; that he intended to make him take it back, and, if he would not take it back, he intended to have a fist and skull fight with him. We have thus stated sufficient of the testimony to show the nature of the homicide, and the element of self-defense in the case. As stated, the court gave a charge on self-defense, but, in connection with that charge, gave a charge on provoking a difficulty, and also, in the same connection, instructed the jury on the right of appellant to go and see deceased on a peaceful mission with reference to the remarks he had heard deceased had made in regard to him. This was in accordance with the doctrine announced in *Shannon v. State*, 35 Tex. Cr. Rep. 2, 60 Am. St. Rep. 17.

It is insisted, however, by appellant that the court committed material error to his prejudice in the charges referred to. We will not quote the charges in extenso, but merely enough thereof to indicate the vice complained of. The court announced as a legal proposition that, if one seeks a meeting with another for the purpose of provoking or bringing about a difficulty for the purpose of killing such person, then such party seeking the difficulty, if the encounter ensues, is not allowed to avail himself of the law of self-defense, although in the difficulty he may have acted upon the defensive, and then

instructed the jury, in substance, that if they believed, etc., that Nat Airhart sought the meeting with Ira Keith with the intent of provoking or bringing about a difficulty for the purpose of killing deceased or doing him some serious bodily injury, then the law will not permit him to avail himself of the law of self-defense, although he may have been compelled to act on the defensive during the progress of the difficulty. Now, it will be seen that the court, in this charge, makes the guilt of the defendant depend on the act of seeking the difficulty by appellant for the purpose of slaying deceased, and his guilt or innocence is not at all made to depend upon what he may have done when he found or met deceased, whereas, in our view of the law, the whole question of his guilt or innocence depends on his acts then done. Of course, we would look to his preceding conduct to characterize or lend significance to his conduct at the time of the meeting. And in the succeeding charge the same vice is manifest. This charge is predicated on the idea of appellant seeking the deceased in order to engage in a fist fight or affray with him, and proceeds on the idea that, if such was his purpose, and the difficulty ensued between him and deceased after they met, he could not set up self-defense, but would be guilty of manslaughter. Now, no matter what his purpose was in seeking deceased, if, when he met him, he did nothing to provoke a difficulty, and deceased assaulted him, under our view of the law his right of self-defense would be perfect. Both of said charges were upon a critical phase of the case; that is, if appellant was entitled to a charge on self-defense at all, he was entitled to a fair charge (and we cannot say that he was not, in view of his own testimony), presenting ⁴⁷³ this view of the case according to the rules of law. Where the doctrine of provocation is to be given in any case, we have heretofore held that the court should be able to lay his hand on the testimony which authorized such a charge. We believe there was such testimony here, for the appellant not only sought the meeting, but his language and conduct after he found deceased indicated that he had sought that meeting for the purpose, and by his own testimony he concedes that he intended to make deceased take back the remark, or have a fist and skull fight with him. He was not to be tried for merely seeking out the deceased but for his acts after he had found him. The judge's charge should have presented this issue squarely to the jury, and not have authorized them to convict him for merely seeking deceased, regardless of

whether he did any act after he found him calculated to provoke a difficulty. As said by this court in *Cartwright v. State*, 14 Tex. Cr. App. 502: "In order to provoke a difficulty, the defendant must also willingly and knowingly use some language or do acts reasonably calculated to lead to an affray or deadly conflict; and, unless the acts are clearly calculated or intended to have such effect, the right of self-defense is not compromised, even though the party armed himself, and went there for the purpose of a difficulty." And see *Morgan v. State*, 34 Tex. Cr. Rep. 222; *Winters v. State*, 37 Tex. Cr. Rep. 582. It is not necessary to discuss other assignments, but, on account of the errors above pointed out, the judgment is reversed and the cause remanded.

HOMICIDE—PROVOCATION—SELF-DEFENSE.—The fact that a person arms himself and seeks an interview with the man who wrongs him is not necessarily a provocation, nor does it place the injured party necessarily in the wrong; and to deprive him of the right of self-defense he must willingly and knowingly use language or commit acts clearly and reasonably calculated and intended to lead to an affray or deadly conflict: *Shannon v. State*, 35 Tex. Cr. Rep. 2, 60 Am. St. Rep. 17. See, further, the monographic note to *State v. Sumner*, 74 Am. St. Rep. 731-735, on the law of self-defense.

THOMAS v. STATE.

[40 TEXAS CRIMINAL REPORTS, 562.]

FORGERY—UNSTAMPED INSTRUMENT.—An instrument required by statute to be stamped is not *per se* void for want of such stamp, and is the subject of forgery.

EVIDENCE.—CONGRESS HAS NO POWER to regulate the introduction of evidence in the state courts.

Scott & Jones, for the appellant.

J. B. Carter, district attorney, and P. A. John, assistant attorney general, for the state.

504 **HENDERSON, J.** Appellant was convicted of uttering a forged instrument, and his punishment assessed at confinement in the penitentiary for a term of two years, and he appeals.

The only question urged by appellant for reversal is that the alleged forged instrument did not have the required in-

ternal revenue stamp on it, the instrument being in the form of an order to pay money. The contention of appellant is that said instrument is void on account of the federal statute requiring such an instrument to be stamped, and that, unless it is stamped, it shall be deemed invalid, and of no effect; and that it is further provided that any such instrument, if executed since July 1, 1898, and not stamped with a stamp, shall not be admissible in evidence. We understand the act in question was for the purpose of levying and collecting a tax on all instruments required under the act to be stamped, and no doubt Congress would have the right to say that no instrument required under the act to be stamped should be used in evidence in any proceeding in any federal court unless it contained the required stamp. But we do not believe Congress would have the power to regulate the introduction of evidence in state courts. Nor do we doubt the power of Congress to require stamps to be placed on certain enumerated instruments—among them the instrument in question—and to provide a penalty for the failure to stamp such an instrument, and to punish all persons failing to comply with the stamp act under proper proceedings ⁵⁶⁵ in the federal court. But we do not believe the act in question was intended to invalidate and make absolutely void orders for money, such as the one in question, unless the same should be properly stamped. To hold otherwise would be to interpolate a new provision of law outside of our statutes on the subject of forgery, and authorize the federal statutes on the subject to control the matter. This is not like the case of *Caffey v. State*, 36 Tex. Cr. Rep. 198, 61 Am. St. Rep. 841, referred to by appellant, in which the instrument was a creature of our law; and we held in that case that the instrument was not complete, so as to import an obligation. Here the instrument was complete in form, and under our law and commercial usage does import an obligation. The federal statutes themselves do not seem to treat the instrument without a stamp as absolutely void, but authorize it to be subsequently stamped on certain proof; so that the instrument in question unstamped is apparently of some legal efficiency, and, as far as the same is concerned, the stamp is an extrinsic matter, and, as stated above, is authorized under federal statutes, under certain circumstances, if unstamped, to be stamped. All the authorities, English and American, hold such an unstamped instrument the subject of forgery: 2 Bishop's Criminal Law, sec. 540, and authorities there cited; 2 Mc-

Clain's Criminal Law, sec. 758, and authorities there cited. And we particularly refer to the following cases: *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *State v. Hill*, 30 Wis. 416, which overrules the former case of *John v. State*, 23 Wis. 504; *Laird v. State*, 61 Md. 309; *State v. Young*, 47 N. H. 402. There being no error in the record, the judgment is affirmed.

FORGERY—UNSTAMPED INSTRUMENT.—Upon an indictment for uttering a forged promissory note it is no defense that the note was unstamped: *State v. Mott*, 16 Minn. 472, 10 Am. Rep. 152; monographic note to *Arnold v. Cost*, 22 Am. Dec. 319. See, too, *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474. On instruments subject of forgery, see the extended notes to *Hendricks v. State*, 8 Am. St. Rep. 467-470; *Arnold v. Cost*, 22 Am. Dec. 315-321.

EVIDENCE—UNSTAMPED INSTRUMENTS AS.—The provision of a federal statute that no instrument shall be admitted or used in evidence in any court until a legal stamp shall have been affixed thereto, applies only to the courts of the United States: *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623. See, further, the notes to *Moore v. Moore*, 7 Am. Rep. 468, 469; *Rheinstrom v. Cone*, 7 Am. Rep. 51.

JOHNSON v. STATE.

[40 TEXAS CRIMINAL REPORTS, 605.]

FORGERY—DEED TO HOMESTEAD.—A homestead cannot be conveyed without the consent of the wife, and not even then unless her privy acknowledgment has been taken to the deed. Hence a deed of a homestead, which is also the separate property of the wife, and which does not show affirmatively her privy examination and acknowledgment, is not the subject of forgery.

FORGERY—ALTERATION OF INSTRUMENT—INSTRUCTIONS.—On a trial for having in possession a forged deed with intent to pass it, in the absence of allegations of forgery by alteration, there is no basis for instructions on the theory that the forgery consisted in altering a genuine instrument.

Burney & Garrett, for the appellant.

J. R. Storms, district attorney, and R. A. John, assistant attorney general, for the state.

⁶¹¹ DAVIDSON, P. J. Appellant was convicted for having in his possession, with intent to pass, an instrument signed by G. A. Tutwiler, Fannie Johnson (wife of appellant), and appellant, conveying his homestead. The instrument is a deed in the ordinary form, including warranty clause, but unac-

knowledge, and purports to have been signed by all the parties on the 15th of July, 1895. The instrument "shows upon its face" that it was intended to convey the homestead of Johnson and wife to Fannie B. Stirman. The indictment does not set out the acknowledgment of any of the parties signing the instrument, nor is there an averment as to any interest that Tutwiler may have had in the homestead of the Johnsons. As set forth in the indictment, we do not believe this instrument the subject of forgery. If Mrs. Fannie Johnson was conveying the title to her homestead, it was a prerequisite to the validity of said conveyance that her privy acknowledgment should have been taken. There can be no conveyance of the homestead, so as to divest the wife of her interest in it, without her privy acknowledgment. There are no explanatory averments in the indictment as to Tutwiler's interest, and, looking upon the face of it, it is not made to appear that Tutwiler had any interest in the homestead of Johnson and wife. As we understand the decisions of our supreme court, the homestead cannot be conveyed without the consent of the wife, and not even then unless her privy acknowledgment has been taken to the deed of conveyance: *Berry v. Donley*, 26 Tex. 745; *Smith v. Elliott*, 39 Tex. 210; *Whetstone v. Coffey*, 48 Tex. 278. See, also, Rev. Stats., arts. 636, 4621. We are therefore of opinion that the instrument, as declared upon, is not the subject of forgery.

We furthermore find that Tutwiler and appellant signed and acknowledged the instrument, and that before Tutwiler did so, he inserted the following: "And the other consideration named in this deed is that said W. A. J. Stirman and wife, Fannie B. Stirman, will convey the Stirman Hotel property, in Ozona, Texas, to G. A. Tutwiler." After this clause was inserted, Tutwiler and appellant signed and acknowledged the deed. Appellant and the notarial officer then carried it to Mrs. Fannie Johnson, to be executed by her; and, when she discovered the above clause inserted, she refused to do so, and the officer left. It was then late at night. The following morning she agreed to sign it if said clause was eliminated, whereupon appellant erased it. She then signed and acknowledged it. Now, if there is a forgery, it is found in the fact that appellant erased from the deed the clause inserted by Tutwiler, and thus altered the instrument. If Tutwiler had any interest in the homestead, it was by reason of the fact that he and another

party ⁶¹² had become sureties for appellant for a debt of twelve hundred dollars due by appellant to other parties, and that he secured Tutwiler against loss by joining his wife in executing to Tutwiler what purported on its face to be a deed to this homestead, but which all the testimony shows was to operate as a mortgage to secure Tutwiler in the event he had to pay said security debt. The facts are further undisputed that this homestead property was also the separate property of Mrs. Fannie Johnson. This being true, it was a legal prerequisite to the conveyance of the property, whether homestead or separate property, that her privy acknowledgment be taken: Rev. Civ. Stats., arts. 635, 4621. Now, the facts demonstrate beyond question that Mrs. Johnson did not sign and acknowledge this instrument until after the clause inserted by Tutwiler had been erased. Her rights in this property, either homestead or separate, could not be conveyed, except upon her privy acknowledgment; and, when that privy acknowledgment was obtained, it was only to the instrument which she signed, and terms contained in it. She did not sign the deed executed by Tutwiler and appellant, but expressly refused to sign the same with the clause contained in it as inserted by Tutwiler. It took her signature to give validity to the original instrument. This she refused, and that signed by her was a different instrument from that signed by the others. This was not a completed instrument, and could not be, legally speaking, until after the signature and privy acknowledgment. Her conveyance of title is measured by the deed she executed, and not by one she did not execute; and, being both homestead and separate property, it was doubly necessary that her privy acknowledgment be taken before the instrument could affect either of those rights. So the instrument signed by Tutwiler and appellant was not a legal instrument, and that signed and acknowledged by the wife was not the instrument signed and acknowledged by them. Under the evidence, if there could be forgery shown, it is found in the fact that appellant erased from the deed the clause inserted by Tutwiler. This erasure is the only fact in the case which could have any possible tendency to show forgery. Now, if the instrument altered by appellant was a nullity, for want of the wife's signature and privy acknowledgment, then her subsequent signature and privy acknowledgment did not relate back, and reinsert the erased clause. So, whether or not the deed was void upon its face,

the facts upon which the state relied are not set forth in the indictment; and the case made by the evidence, even if the erasure constituted forgery, does not support the allegations in the indictment. In other words, if, under the evidence, Johnson could be charged with forgery, it must be by reason of the alteration; and this alteration should have been set forth in the indictment. But, as before stated, this alteration was that of an instrument which was a nullity. Therefore, it could not technically form the basis of forgery, and appellant could not be guilty of having a forged instrument in his possession, etc.

Appellant urges quite a number of other errors, but, under the view we take of the case, we deem it unnecessary to discuss them. However, ⁶¹³ we note the fact that the whole case was submitted by the court to the jury upon the theory that the forgery was constituted by altering a genuine instrument. As before stated, there was no allegation of forgery by alteration, and this charge was therefore erroneous. The charge must conform to the allegations of the indictment. The judgment is reversed, and the prosecution ordered dismissed.

FORGERY—INSTRUMENTS, WHETHER SUBJECT OF.—A mortgage of a homestead may be a forgery, though it purports to be executed by the husband alone, and therefore would be inoperative even if genuine: *People v. Baker*, 100 Cal. 188, 38 Am. St. Rep. 276. A deed of a married woman, not acknowledged as required by statute, cannot be made the foundation of an indictment for forgery: See the extended notes to *Arnold v. Cost*, 22 Am. Dec. 316, and *Hendricks v. State*, 8 Am. St. Rep. 469, on instruments subject of forgery.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BOUTWELL v. MARR.

[71 VERMONT, 1.]

THE CRIME OF CONSPIRACY CONSISTS in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means.

CONSPIRACY—CRIME OF—CIVIL ACTION.—While a mere agreement to effect an illegal purpose or to use illegal means is punishable as a crime, a civil action cannot be sustained therefor unless something causing damage to the plaintiff has been done in furtherance of the agreement.

CONSPIRACY TO BOYCOTT—INTIMIDATION.—A person has a right to withdraw his own business patronage when he pleases, but he has no right to employ threats or intimidation to divert the patronage of another.

CONSPIRACY TO BOYCOTT—UNITED ACTION AS AN UNLAWFUL MEANS.—If it be true, as a general proposition, that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means.

CONSPIRACY TO BOYCOTT—UNITED ACTION—COERCION—REDRESS.—If a person is injured in his business by the withdrawal of patronage through the united action of an association, he is entitled to redress, where the concert of action was procured by coercive measures, such as the imposition of fines and penalties, notwithstanding the voluntary acceptance, by members, of by-laws providing for the imposition of coercive fines.

CONSPIRACY TO BOYCOTT—EVIDENCE.—In an action against an association to recover damages for conspiracy to boycott, evidence which tends to characterize the withdrawal of patronage, when made, which shows the existence and rules of a like organization connected with the defendant, and which shows the purpose and use of the association, and its coercive character as against its own members, is admissible. The statements of different defendants, indicative of their purpose, and of members of the

association, not defendants, as to the force and effect of a vote upon a resolution to withdraw patronage, made contemporaneously with and in explanation of their action under it, are also admissible.

DAMAGES.—EXEMPLARY DAMAGES, if ever recoverable against several defendants, are recoverable only where all are shown to have been moved by a wanton desire to injure.

Case. The defendants, at the close of the testimony, moved for a verdict for insufficiency of evidence. The court overruled the motion. The jury was allowed to include exemplary damages in its verdict, but was required to report the amount thereof separately. There was a judgment for the plaintiffs, and the defendants appealed.

George W. Wing, C. A. Prouty, and J. P. Lamson, for the appellants.

W. A. Lord, John H. Senter, and Dillingham, Huse & Howland, for the appellees.

MUNSON, J. On the sixth day of June, 1893, the plaintiffs obtained a bond for the conveyance of a mill in Barre, equipped with machinery for polishing granite; and on the sixteenth day of the month they received a deed and took possession of the property, and became copartners under the name of the Boutwell Polishing Company. The mill had been operated for several years by the plaintiffs' grantor; and in the interval between the taking of the bond and the receipt of the deed, the plaintiffs saw the patrons of the mill and received assurances of a continuance of their custom, limited in the case of some patrons by the mention of an expectation or a possibility of their putting in polishing machines of their own. From the time of their purchase until November the work of the mill averaged over one thousand dollars a month, that of the last month being but little below that amount. In November the ⁴ receipts were some less than two hundred dollars. In December and January the mill was without work, and substantially all that it did after that was upon stock purchased by the company from parties outside of Barre. On the 19th of April, 1894, the mill was sold to one of the defendants. No complaint was ever made of the plaintiffs' work or their methods of business.

During this time there was an organization in Barre called the Granite Manufacturers' Association, which embraced about ninety-five per cent of all the granite manufacturers in the place. There was also an organization located at Boston, called

the Granite Manufacturers' Association of New England, with which were connected the local organizations of the New England states, including that at Barre. All the defendants held by the verdict were members of the Barre association. Neither the plaintiffs' firm nor any of its members were connected with this or any similar organization. Prior to November, 1893, the Barre association adopted by-laws which prohibited dealings with members not in good standing, and imposed fines for the violation of its rules. On the 10th of November, the association indorsed a resolution previously adopted by the New England association, which recommended that none of its members sell any rough stock, partly finished or finished granite, directly or indirectly, to any firm, individual, or corporation, engaged in cutting, quarrying, or polishing granite in any of the New England states or in New York city, and not a member of the association. On the 24th of November, the association adopted a resolution of the following terms: "Resolved, for the purpose of strengthening the association, and [for] the mutual protection of its members, [that] no trade shall be conducted with any individual, firm, or corporation, engaged in cutting, quarrying, or polishing granite, in the state of Vermont, who are not members of this association."

George Lampson, a defendant, testified that he assisted in the formation of both associations, and had been connected with them ever since; that he was notified by a circular of the action taken November 10th; that the effect of that resolution would be that if a company declined to join the association, no member of the association would thereafter do any business with it. Alexander Gordon, another defendant, testified that he understood that the main reason for the collapse of the plaintiffs' business was the passage of the resolution; that he voted for it, and did so believing that it would have that effect on their business; that after its passage he stopped sending work to the plaintiffs, and that he did so because of that vote.

It appears from the testimony of some of the defendants that during the summer and early fall of 1893 they had several conversations with John W. Dillon, the manager of the plaintiffs' business, in regard to their becoming members of the association, in which they expressed a desire to have them join. Mr. Kemp, one of the plaintiffs, testified that some time in November, and after the loss of their business, defendant Kelliher asked him why they wouldn't join the association, and

said they would find out that they would have to join it before they could do any business. Mr. Senter, an attorney for the plaintiffs, testified that in December, defendant Eagan, on coming out from an interview with the plaintiffs, said to him that "they would find out they couldn't do any polishing business until they joined the association." Mr. Kemp further testified that in January, 1894, he had two interviews with certain defendants, at their suggestion, in which the question of plaintiffs joining the association was discussed at length. His testimony tended to show that the first of these meetings was with defendants Ady and Gordon, and that Ady remarked that the object of the interview was to see if they could induce the plaintiffs to join the association, but that they hardly expected to get them to, as they supposed plaintiffs were still stubborn about joining; that later in " the conversation he used substantially these words, "I will admit that the effect of that resolution was to destroy the business of your company in one day, but it is my opinion that if you will join the association you can get your business all back in one day," and that Gordon, on being appealed to by Ady, affirmed his statement; that the second of these interviews was with the defendant J. D. Smith, who said it was true that the action of the association had had the effect to close plaintiffs' mill, but that he was perfectly confident that it could be started up with all their old customers at once, if they would join the association.

The defendants have not brought up their exceptions to the charge, but stand on their motion that a verdict be directed for want of sufficient evidence to make them liable. There was clearly evidence tending to show that the defendants undertook to compel the plaintiffs to join the association by depriving their mill of work, and that they made use of their organization, as a means of concerted action, to accomplish their purpose. But there was no evidence tending to show that the defendants made any attempt to compel persons, not members of the association, to withhold their patronage, and they insist that they cannot be made liable for simply withholding their own.

The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means: *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710. But the grounds of recovery in a civil suit are not identical with the

elements of the crime. The law punishes the mere agreement to effect an illegal purpose or to use illegal means. But it is clear that a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement; and it is claimed to be also requisite that the thing done be something unlawful in itself. This would preclude a reliance upon the existence of an illegal purpose, and require that the means used be ⁷ illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement and resulting in damage, even though not itself a violation of right, would sustain a recovery. But the view suggested is not sustained by the authorities, and we proceed with our inquiry upon the assumption that there can be no recovery unless illegal means were employed.

It is clear that everyone has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another. If it be true as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. The defendants insist that as members of the association they had a right to resolve to keep their work among themselves, and that in the absence of anything tending to show an attempt on their part to influence the action of others, they cannot be held liable. It may be true that if the defendants, acting independently of any organization and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiffs' business would have been the same, and yet the defendants have incurred no liability. But in the case supposed the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that operated by the defendants.

It is true, as suggested in argument, that everyone engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But when those upon whom he depends for patronage are acting as individuals, he has a measure of security in the ⁸ probability that different preferences will be shown by persons left to

their own choice; and if some who desire to injure his business secure the co-operation of others by unlawful means, the law gives him a remedy. If the defendants are right, he can be deprived of this security and this remedy by converting those who desire his injury into the majority of an association, and those who do not into a suppressed minority, held to the designated course by the pressure of a system of fines and penalties. But giving a new face to an old wrong can never defeat the remedy, for the law will inquire as to the substance of the thing complained of. If the plaintiffs were in fact injured by a forced withdrawal of patronage secured through the action of defendants' organization, they are entitled to redress. Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case, it could easily be found that a fine of fifty dollars for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in an aggressive movement of unlawful character, the defendants cannot complain if the law so treats it. The jury could properly infer from the nature and management of the defendants' organization that their united action was due in part to the means adopted to secure it. The force of the measure resolved upon lay partly in the fact that the by-laws threatened penalties against any who should fail in carrying it into effect.

⁹ The fact that the members of the association voluntarily assumed its obligations in the first instance, so far as it be a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with

the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association. But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above recited; and, as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of united action against the plaintiffs. It would be strange indeed if the members of an association, organized upon such a basis and advanced by such means, could meet a claim of this nature by saying that they had made no attempt to secure the co-operation of outside parties. It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling other manufacturers to join them in withholding patronage, its members would have been liable. But it is claimed, in effect, that a business can be destroyed with impunity, when the organization has become so extensive that there are no outside patrons to ¹⁰ control, or so few that their course is a matter of no moment. Upon this theory, every successful instance of coercion would increase the safety with which another coercion could be attempted, and when coercion had been pursued until but one contumacious person remained, immunity would be complete. It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants, and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor.

The evidence excepted to was properly admitted. Evidence that defendants individually expressed a purpose to continue to patronize the mill, in connection with evidence that they did so without complaint until the general withdrawal, was evidence tending to characterize the withdrawal when made. The items offered as showing the profit of the mill tended to establish the damages according to the rule adopted by the court, and no question is now made as to the correctness of

that rule. Evidence of the existence and rules of the New England association was admissible because of the connection of that body with the local organization. The resolution and by-laws of the Barre association, the agreement of that association with the Boston Wholesalers' Association in restriction of the sales of its members, the appointment of a committee to inquire as to violations of its rules, the official correspondence had with one of its members upon that subject, the fact that a fine was imposed for an ascertained violation, and the action of the association in assuming the defense of its secretary when sued because of a letter written in respect to an alleged violation, were all admissible as showing the purpose and use of the organization, and its coercive character as against its own members. The statements of different defendants indicative of their purpose, and of members of the association not defendants as to the force ¹¹ and effect of the vote, made contemporaneously with and in explanation of their action under it, were clearly admissible.

The case stands upon grounds which are inconsistent with the allowance of exemplary damages; for damages of this nature, if ever recoverable against several defendants, are recoverable only where all are shown to have been moved by a wanton desire to injure. The exemplary damages were separated by a special verdict, but were included in the judgment rendered.

Judgment reversed, and judgment for actual damages with interest from date of judgment below.

CONSPIRACY—DEFINITION.—A conspiracy, as commonly understood, is an agreement or combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful or criminal means: *Note to Macauley v. Tierney*, 61 Am. St. Rep. 779; *Longshore Printing Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640. This definition has been extended, by modern decisions, to include combinations to effect acts injurious if carried out by the concerted action of many: *Notes to Longshore Printing Co. v. Howell*, 46 Am. St. Rep. 657; *Doremus v. Hennessy*, 68 Am. St. Rep. 210.

CONSPIRACY TO BOYCOTT—INTIMIDATION—COERCION.—A boycott is a combination of many to cause a loss to one person by coercing others against their will to withhold from him their beneficial business intercourse, through threats that unless those others do so the many will cause similar loss to him: *Beck v. Railway etc. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421. A boycott is equally unlawful when the means employed are threatening in their nature, and are intended and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do: *Beck v. Railway etc. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421.

The means by which it is generally sought to accomplish a boycott are not only unlawful, but are in some degree criminal: *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23.

CONSPIRACY—CIVIL ACTION LIES FOR, WHEN.—A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give the right of action. The true test as to whether such an action will lie is whether or not the act accomplished, after the conspiracy has been formed, is itself actionable: *Notes to Doremus v. Hennessy*, 68 Am. St. Rep. 211; *Cote v. Murphy*, 39 Am. St. Rep. 696.

CONSPIRACY—EVIDENCE.—The conspiracy being proved, the acts and declarations of coconspirators, when a part of the *res gestae*, and which were done and made after the inception and before the completion of the criminal enterprise, and were in furtherance of the common design, are admissible in evidence against all: *Note to Spies v. People*, 3 Am. St. Rep. 487.

WARREN v. BUCK.

[71 VERMONT, 44.]

SALES—RULE OF CAVEAT EMPTOR—EXCEPTION AS TO PROVISIONS.—Upon the sale of goods and chattels, if there is no express warranty of their quality and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law; and the exception in respect to provisions does not extend beyond the case of a dealer who sells them directly to the consumer for domestic use.

SALES.—THE MAXIM CAVEAT EMPTOR APPLIES, and a defendant is not answerable where he, being a farmer, sold to the plaintiff, a butcher, seven hogs, on inspection, at a certain price per pound, knowing that they were to be killed, cut up, and sold, in the usual course of business, as was done, and two of the hogs had tuberculosis, a latent defect rendering them unfit for food and dangerous to a consumer's health.

Assumpsit. The material facts are embodied in the second syllabus, *supra*. There was a judgment for the defendant and the plaintiff appealed.

G. M. Powers, for the appellant.

R. W. Hulburt, for the appellee.

⁴⁵ **TYLER, J.** The general rule of the common law is, as stated in *Brvant v. Pember*, 45 Vt. 487, that upon the sale of goods and chattels, if there is no express warranty of their quality and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law; and the exception in respect to provisions does not extend beyond the case of a dealer who

sells them directly to the consumer for domestic use: Benjamin on Sales, ed. 1888, 639; 2 Kent's Commentaries, 13th ed., 478, notes.

In *Bragg v. Morrill*, 49 Vt. 47, 24 Am. Rep. 102, the court, referring to this subject, said: "Generally, in all sales of provisions, there is a like implied warranty that they are wholesome: 1 Parsons on Contracts, 470, and notes. But this doctrine has exceptions, and is held applicable only when the vendor is the producer, or when he exposes them for sale for domestic use as a provision dealer." American and English cases are cited in support of the rule. By the term "producer," the court evidently had reference to articles manufactured by the vendor. The term may also be applied to certain products of the farm, as was held in *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150, where the plaintiff bought a quantity of hay of the defendant for a particular use, and the defendant knew that the plaintiff would not buy an inferior article for that use; held, that a warranty was implied. But in that case the defendant professed and was supposed to have knowledge in respect to the quality of the commodity sold.

In *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 394, the contract was for the ⁴⁶ sale of a quantity of cheese manufactured by the seller, and which the purchaser had no opportunity to inspect, and which the seller knew was bought for a foreign market. There a warranty was implied against the latent defect, afterward discovered, upon the ground that the defect arose from the defendant's want of care and skill in the manufacture of the cheese.

The case of *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570, is distinguishable from the present one. There both the plaintiff and the defendants were engaged in the business of buying hogs for market, and the defendants engaged the plaintiff to furnish nine hogs to fill their car for shipment, they to pay the highest ruling price for prime marketable hogs. The plaintiff knew the quality required, and that the defendants were paying the price for that quality, and that the defendants relied upon his judgment to select and furnish hogs of the required quality. It was not a sale of hogs which the plaintiff had on hand, but of hogs to be selected and supplied by him without inspection by the defendants. It was held that there was an implied warranty that the hogs were suitable for the use intended. The contract was executory, and there was an undertaking by the plaintiff to furnish hogs of

a certain quality. In the present case there was a sale of specific chattels, and there was no undertaking by the plaintiff that they were of any particular quality, and the defect was not discoverable on inspection.

In *Maynard v. Maynard*, 49 Vt. 297, the defendant did not disclose the fact of which he had knowledge, that the animal sold by him to the plaintiff was worthless for the purpose for which the plaintiff informed him he wanted it; held, that the concealment of the fact was fraudulent, though the defendant made no affirmative representations, nor was he inquired of whether the animal was suitable.

Wing v. Chapman, 49 Vt. 33, was an action on the case for the false warranty of a yoke of oxen. After discussing ⁴⁷ the subject of the express warranty the court said: "Even without any express warranty, in this class of contracts, the law has now become pretty well settled that where the special purpose of the buyer is made known to the seller, and the seller, with such knowledge, delivers the goods, the law implies that they are reasonably fit for the purpose specified. If the facts show that the buyer trusts to the judgment of the seller, the seller must see to it that he judges correctly. The question has been much discussed whether this doctrine applied in cases where the seller was not the manufacturer of the goods sold; but it is now settled that it applies generally in all sales of property for a special purpose, if the sale is made on the judgment and skill of the vendor."

In *Badger v. Whitcomb*, 66 Vt. 125, the seller made no representation in respect to the boards sold. The defendants had an opportunity to inspect them, and were requested by the seller to inspect them, and by inspecting them they could have discovered the defect; held, that there was no implied warranty.

In *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608. the instruction of the trial court that, "if the plaintiff knew that the defendants wanted to purchase the cow for the purpose of immediately cutting it up into beef, for immediate domestic use, there would be an implied warranty that the cow was fit for that purpose," was held erroneous and the common-law rule was adhered to. The same doctrine was held in *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472. The cases that are exceptions to this rule will generally be found to contain the element of deceit, as in *Divine v. McCormick*, 50 Barb. 116; in *Wing v. Chapman*, 49 Vt. 33;

and in *Maynard v. Maynard*, 49 Vt. 297. In England, vendors of food are only liable for defects of which they had or might have had knowledge: See cases in notes to Kent's Commentaries, 13th ed., 478.

Judgment affirmed.

SALES.—A WARRANTY THAT AN ARTICLE IS FIT FOR FOOD IS IMPLIED in sales by dealers and common traders for direct consumption; but, upon the sale of animals to retail butchers, there is no implied warranty that they are fit for food, although the seller knows that they buy the animals for the purpose of killing and cutting them up as food, for immediate use: Note to *Giroux v. Stedman*, 1 Am. St. Rep. 475; *Hanson v. Hartse*, 70 Minn. 282, 68 Am. St. Rep. 527, and note.

SALES—LATENT DEFECTS.—When there is no express warranty, and the vendor sells a thing as sound which has a latent defect unknown to him, he is not answerable to the buyer: Note to *Court v. Snyder*, 50 Am. St. Rep. 250.

PLUMMER v. RICKER.

[71 VERMONT, 114.]

ANIMALS—KEEPER OF VICIOUS DOG—DUTY OF.—The keeper of a dog is charged with the same duty to restrain it, if he is aware of its propensity to bite persons, that is imposed upon an actual owner of the animal.

ANIMALS—KEEPER OF DOG—WHO IS.—A person who houses, harbors, and feeds a dog in the way that such animals are usually kept by owners, and permits it to be a member of his family, in so far as such domestic animals can be members of families, may well be regarded as its keeper.

ANIMALS — DOGS — VICIOUSNESS — EVIDENCE. — The viciousness of a dog may be shown by evidence of vicious acts not within the knowledge of its keeper.

APPEAL.—ERROR CANNOT BE PREDICATED upon an improper answer to a proper question.

EVIDENCE.—EXCLAMATIONS IN SLEEP are not admissible in evidence. Hence, in an action to recover damages for injuries resulting to a boy from the bite of an alleged vicious dog, it is error to permit the boy's father to testify that the first two or three nights after the boy was bitten he would, when dropping into a drowse, jump up and call, "Take him off, he is biting me!" Such testimony is hearsay.

The plaintiff, a young boy, claimed to have been attacked and bitten by the defendant's dog. There was a judgment for the plaintiff and the defendant appealed.

Bates, May & Simonds, for the appellant.

Smith & Sloane, for the appellee.

115 START, J. The action is case for the recovery of damages resulting from the bite of an alleged vicious dog. The plaintiff's evidence tended to show that the dog was given to the defendant's minor son; that he was kept at the defendant's house nearly all the summer and fall before he bit the plaintiff; that he had been seen to follow the defendant's team; that both the son and the dog made the defendant's house their home; that the dog had bitten one boy before at the defendant's house, of which the defendant was informed; and that the defendant stated that he would not have the dog killed. The court instructed the jury that if the defendant was the head of the family and suffered or permitted the dog in question to be kept on the premises, in the way such domestic animals are usually kept, as a member of the family, so to speak, in so far as a house dog can be termed a member of one's family, then, within the meaning of the law, he was the keeper of the dog, and the same duty was imposed upon him as such keeper to restrain him, if he was aware of his propensity to bite persons, that would have been imposed upon him had he been the actual owner. The court also told the jury that if the son was stopping at the defendant's and the defendant permitted him to have the dog there, and permitted the dog to make that place his home and to be, as much as a dog can, a member of his, the defendant's, family, then the dog would not be there casually in the sense indicated; and the duty explained would arise and rest upon the defendant to see **116** that while he was thus there he was properly restrained, if he knew that he was accustomed to do that which in law amounts to being accustomed to bite persons. The defendant excepted to what the court said would in law constitute a keeper of the dog, and to what the court said about the keeping of the dog at the defendant's place by the son.

In these instructions there was no error. If the defendant housed, harbored, and fed the dog in the way such animals are usually kept by owners, and permitted him to be a member of his family, in so far as such domestic animals can be members of families, he may well be regarded as the keeper of the dog. In *Barrett v. Malden etc. R. R. Co.*, 3 Allen, 101, under a statute rendering the keeper as well as the owner

of a dog liable to any person injured by him, it was held that the fact that the dog was kept on the defendant's premises by a person in its employment, who had the charge and superintendence of its stable, with the knowledge and implied assent of its general manager or superintendent, was sufficient to warrant the jury in finding that the dog was kept by the defendant. In *Cummings v. Riley*, 52 N. H. 368, it is held that if the head of a family, having the possession and control of a house or premises, suffers or permits a dog to be kept on the premises, in the way such domestic animals are usually kept, such head of the family may be regarded as the keeper of the dog. In *Harris v. Fisher*, 115 N. C. 318, 44 Am. St. Rep. 452, it is held that the owner of premises, who, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits such a dog to run at large, is liable for any damage done by the dog to a passer by.

It was incumbent upon the plaintiff to show that the dog was vicious, and for this purpose the testimony of Homer Varnum, a former owner of the dog, was properly received, notwithstanding the vicious acts testified to did not come ¹¹⁷ to the defendant's knowledge. It was sufficient to show by other evidence that the defendant knew that the dog was vicious: *Corliss v. Smith*, 53 Vt. 532.

There was no error in allowing the witness, Norman Perkins, to state how the dog was kept on the defendant's premises while he was there, nor in allowing the plaintiff to ask the witness why the dog was tied. The question was proper, and error cannot be predicated upon an improper answer: *Cutler v. Skeels*, 69 Vt. 154.

The plaintiff's father being asked to describe in a general way how the plaintiff appeared from the time he was bitten down to the time the sore healed, stated that he was very nervous the first two or three days, that nights especially, the moment he would drop into a drowse, he would jump up and call, "Take him off," the dog was biting him. The court, in holding that this testimony was admissible, said, "If the boy's story is found to be true, it tends to show that the dog made a visible attack upon him, and that has a bearing upon the question of how it may have affected his nerves, impressed itself upon him. We think that, if it should be found that it so impressed him that when asleep the impression followed him, made him nervous and caused him to cry out, it is evidence indicating the condition of the boy. It is not evidence

tending to show the dog ever bit him." To this ruling the defendant excepted.

Under this ruling the jury were at liberty to consider the words spoken by the plaintiff while in sleep, upon the question of how the attack of the dog impressed itself upon him and affected his nerves. Words spoken while in sleep are not evidence of a fact or condition of mind; they proceed from an unconscious and irresponsible condition; they have little or no meaning; they are as likely to refer to unreal facts or conditions as to things real; they are wholly unreliable, and a jury ought not to be allowed to guess that such expressions are produced by a present mental or physical condition. The expressions of a person respecting ¹¹⁸ a past mental or bodily condition cannot be shown by a nonprofessional witness. The testimony of such a witness is confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady: *State v. Fournier*, 68 Vt. 262; *Knox v. Wheelock*, 54 Vt. 150. The expressions of a person in sleep may be induced without cause and by past as well as present conditions. In dreams things long forgotten return, and we live over a past that has no relation to present conditions, and exclamations then made are as likely to be induced by a past as by a present condition. If what the plaintiff said while in sleep can be given any meaning, it was narration of a past event and did not indicate his present mental or physical condition, and the testimony was hearsay and inadmissible: *State v. Fournier*, 68 Vt. 262. In *People v. Robinson*, 19 Cal. 40, it is held that words spoken in sleep are not admissible in evidence.

Reversed and remanded.

ANIMALS—KEEPER OF DOGS—DUTY AND LIABILITY OF. The owner or keeper of a domestic animal which is vicious and prone or accustomed to do violence, having knowledge of its disposition and habits, must, at his peril, keep it safely and securely, so that it cannot inflict injury: *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122; *Clowdis v. Fresno etc. Irr. Co.*, 118 Cal. 315, 62 Am. St. Rep. 238. Knowledge of the owner that his beast was vicious must be alleged and proved, in suits for injuries by domestic animals, if they were rightfully in the place where the mischief was done, for unless he knew that they were vicious he is not liable; but, if he did have such knowledge, he is liable. The gist of such actions is the keeping of the animal after knowledge of its vicious propensities: *Note to Reed v. Southern Exp. Co.*, 51 Am. St. Rep. 64. The keeper of a vicious dog must see to it that he is kept securely, or he is answerable for all injury done by him; and it is not necessary that he shall have positive notice of an

injury actually committed. It is sufficient if he has notice that the disposition of the dog is such that it would be likely to bite a person: *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. Rep. 50. Compare the extended note to *Knowles v. Mulder*, 16 Am. St. Rep. 631; *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716.

RANCHAU v. RUTLAND RAILROAD COMPANY.

[71 VERMONT, 142.]

RAILROADS—LOSS OF BAGGAGE—PLEADING.—THERE IS NO VARIANCE between the pleadings and the proof, in an action against a railroad company for the loss of baggage, where it is alleged that the company, as a common carrier, received and undertook to transport safely, and to deliver to the plaintiff, a certain box containing specified articles, and the proof shows that the plaintiff bought a ticket, and that the company received the box as a part of the plaintiff's baggage, giving him a check therefor.

WITNESSES—PERSONAL KNOWLEDGE.—IT IS PRESUMED that the answer of a witness is based upon his personal knowledge.

APPEAL—EXCEPTIONS—"FACTS APPEARED"—MEANING OF.—When exceptions state that certain "facts appeared," they mean that there was no controversy over the existence of such facts.

RAILROADS — TICKETS — PRINTED RESTRICTIONS THEREON—FORCE OF.—The holder of a railroad passenger ticket is not bound by a restriction printed thereon, limiting the company's liability for loss of baggage, unless he had notice thereof when he bought it. He is not, therefore, bound by the restriction, where he could neither read nor write, and was not informed of it by anyone.

APPEAL—MISSTATEMENT OF FACTS, BY COUNSEL.—IT IS REVERSIBLE ERROR for a court to permit counsel, in argument before the jury, to state facts not authorized by the evidence.

Case for loss of baggage. There was a judgment for the plaintiff and the company appealed.

W. W. Stickney and J. G. Sargent, for the appellant.

C. F. Robb, for the appellee.

143 **ROSS, C. J.** 1. The declaration, in substance, alleges that the defendant, in the capacity of a common carrier, undertook, for hire, to carry safely for the plaintiff from Burlington, Vermont, to Fitchburg, Massachusetts, a box containing certain specified articles, and there to deliver it to the

plaintiff; that the box was delivered to the defendant, and that it so carelessly and negligently conducted in the premises that the box and its contents were wholly lost to the plaintiff.

Against the objection and exception of the defendant, the plaintiff was allowed to show that, on the occasion specified in the declaration, he purchased a ticket for himself and family of the defendant from Burlington to Fitchburg, and that defendant received as a part of his baggage, and gave him a check therefor, the box named in the declaration; that he with his family rode on the ticket to Fitchburg, but that the defendant did not safely carry nor deliver to him at Fitchburg the box, nor any of its contents.

The defendant insists that this box and contents should have been described in the declaration as the baggage of the plaintiff, and without such description the testimony excepted to was not admissible. This exception is not well taken. The capacity in which the defendant was acting and its undertaking are properly set forth, and the property sufficiently described to enable it to be identified. There ¹⁴⁴ was no variance between the allegations of the declaration and the proof. If the box and contents had been described as baggage, it would only have added another element for its identification. It was not necessary for that purpose. Nor was it necessary to allege that the hire for carrying the box and contents was a part of the purchase money of the plaintiff's ticket for himself and family. The defendant was also a common carrier of the box and contents, even if it had by special contract to some extent limited its common-law liability as such carrier.

2. The baggage check for the box claimed to have been lost was 17,652. The defendant introduced as a witness the baggage master at the Fitchburg station, who testified that he received no baggage answering to this check; that he made search for it for some time, and then passed the matter over to another servant of the Fitchburg Railroad. Against the exception of the defendant, on cross-examination, the witness was asked if they ever found a box or any baggage called for by this check anywhere on the Fitchburg road. The inquiry was proper. On its face it did not call for anything but the personal knowledge of the witness. His answer, no, must be presumed to be upon his personal knowledge, until something further was shown. The question did not call for what he had heard from others, as contended by the defendant, nor does his answer profess to be given upon information. But

if the question and answer are capable of the construction claimed by defendant, the defendant could not have been injured by its admission. It is stated in the exceptions that it appeared by the defendant's testimony that the baggage was examined soon after the train left Burlington, and there was no baggage upon the train corresponding with the check for the claimed lost baggage, and none received by the Fitchburg station. Hence the testimony of this witness, if improperly received, was no more than what the defendant conceded to be true by its own witnesses. When exceptions state that certain ¹⁴⁵ facts appeared, they mean there was no controversy over the existence of such facts.

3. The ticket sold by the defendant to the plaintiff contained a clause stating that the defendant, "in selling the ticket and checking baggage hereon acts as agent, and is not responsible beyond its own line." The verdict of the jury finding that the loss occurred on the defendant's own line, renders a consideration of this clause immaterial. It also contains a clause stating, "Baggage liability of any company is limited to wearing apparel not exceeding one hundred dollars in value." The special verdict finds that the plaintiff's damages were one hundred and fifty-eight dollars, of which one hundred and forty-three dollars was for wearing apparel. The defendant contends that the court erroneously, against its exception, rendered judgment for the largest sum named. This attempt of the defendant to limit its common-law liability as a common carrier must be considered with reference to the other undisputed facts stated in the exceptions. It is there stated that the evidence tended to show that the plaintiff could neither read nor write; that the tickets were not read to him by any person, and that he did not know the provisions of the tickets. With this testimony in the case, the defendant was not entitled to have the court comply with its four requests: "That the plaintiff is bound by the terms of the contract set forth on his ticket; that by said contract the defendant is only liable for loss of baggage occurring on its own line; that defendant's liability is limited to wearing apparel as specified in the contract; that the defendant's liability is limited to wearing apparel not exceeding one hundred dollars in value." These requests all assume that such a contract existed between the plaintiff and defendant. This assumption was not warranted by the testimony in the case.

The defendant by its charter became a common carrier of passengers and their baggage, subject to the common-law rules in regard to liability therefor. By nearly universal concurrence of decisions of courts of final resort, including ¹⁴⁶ the decisions of this court, such carrier may by contract reasonably limit and vary its common-law liability, except as to its own negligence. But, being by its charter and occupation subject to the common-law liability, it will be held to that liability until it establishes that it has limited or varied it by a contract, express or implied, existing between it and its passenger. The ordinary passenger ticket does not profess to contain the contract by which the passenger obtains his right to carriage over the road of the carrier. It is only a receipt, or token, given by the carrier for the passenger to show to its servants and managers of its trains, that he has purchased the right to be safely carried on its trains between the stations specified. In this respect it is different from a bill of lading for the carriage of freight. Whatever is printed on passenger tickets has usually been regarded as a notice by the carrier of its desire to limit or vary its common-law liability. To effect such limitation, the carrier must show that the passenger, when he paid his money and received the ticket, did it under such circumstances that he assented to the conditions named upon the ticket. Whether such assent is established depends upon the circumstances of each case. Assent will not be presumed unless a knowledge of the proposed conditions and limitations are known by the passenger, and then much will depend upon whether they are reasonable or unreasonable. If not entirely reasonable, assent will not be presumed from knowledge merely, because the carrier without such assent is under the common-law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them; but express assent must be established. As the defendant took no exceptions to the charge on the subject of the special ¹⁴⁷ findings of the jury, it is to be presumed that the court stated the law correctly in regard thereto, and that the jury found, as the plaintiff's testimony tended to show, that he had no knowledge of the conditions placed by the defendant upon his ticket at the time he purchased it. He must have

had knowledge of them at the time he paid his money. When purchasing the ticket, the passenger frequently has no opportunity nor time to examine it. He has a right to understand, unless directly informed to the contrary, that the carrier's undertaking has the common-law liability. It is unreasonable to hold, if the conditions printed on the ticket come to his knowledge first after he has entered upon his journey, that he should be held to have assented thereto.

His assent may well be assumed when he knows that the carrier is selling special tickets at reduced rates, with the conditions and limitations plainly stated in the notices of the sale of such special tickets: 3 Am. & Eng. Ency. of Law, tit. Baggage, Duty to Carry, 543, and notes, Limitation of Liability, 554, and notes; 5 Am. & Eng. Ency. of Law, tit. Carriers of Passengers, Limitations of Liability, 608, 612, and notes; Bissell v. New York Cent. R. R. Co., 25 N. Y. 442, 82 Am. Dec. 369, and note; Hollester v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455, and note; Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470, and note; Newell v. Smith, 49 Vt. 255; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Kimball v. Rutland etc. R. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Farmers' etc. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Thorp v. Concord R. R. Co., 61 Vt. 378; Gillis v. Western Union Tel. Co., 61 Vt. 461, 15 Am. St. Rep. 917; Hodd v. Express Co., 52 Vt. 335, 36 Am. Rep. 757; Davis v. Central Vt. R. R. Co., 66 Vt. 290, 44 Am. St. Rep. 852. In Davis v. Central Vt. R. R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, where a bill of lading is considered, it is said in regard to notices: "Notice, unless brought distinctly to the knowledge of the consignor in such a manner that the law will imply his assent to the limitation contained in the notice, will not be considered as entering into and forming a part of the contract." The special verdict does not establish that the plaintiff had ¹⁴⁸ knowledge of the conditions printed upon his ticket, and his assent thereto will not be implied. The defendant rests under the common-law liability in regard to the loss of the baggage. That liability, as held in Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646, entitles the plaintiff to recover for the bedding lost, or for his entire loss.

4. In the closing argument the plaintiff's counsel said: "The policy of the defendant was evidently to fight every claim; that if the defense was honest it would arbitrate, . . . but,

no, their policy was to fight." There was no evidence in the case that authorized the assertion of these facts. On the defendant's objection to this line of argument the court told the counsel to confine himself to a discussion of the testimony, and made no other ruling in regard to the defendant's objection, and allows exception to its action, if the matter was the subject of exception. The counsel did not proceed further in that line of argument, nor did he retract the statements quoted. The statement, if allowed to stand, was calculated to prejudice the defendant with the jury, and must have been intentionally made for that purpose. It charged the defendant with making a dishonest defense to the plaintiff's claim, as a conclusion from alleged facts, of the existence of which there was no evidence in the case. If it had been an unintentional mistake the counsel should, and would, have corrected it as soon as objection was made. The court also should have corrected this statement of facts which did not exist. Failing to do so, the defendant was entitled to an exception. As said by this court in *Cutler v. Skeels*, 69 Vt. 161: "It was a statement of facts that he had no right to make, and as it was permitted by the court, we regard it as an implied ruling that such argument was legitimate." Its allowance, under the circumstances, was reversible error: *Magoon v. Boston etc. R. R. Co.*, 67 Vt. 196; *State v. Hannett*, 54 Vt. 83; *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561.

Judgment reversed and cause remanded.

RAILROADS — TICKETS LIMITING LIABILITY — FORCE OF.—The purchaser of a railway passenger ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them: *Kent v. Baltimore etc. R. R. Co.*, 45 Ohio St. 284, 4 Am. St. Rep. 539. Hence, before one can be bound by the declarations in a ticket for transportation on a passenger train limiting liability for baggage checked by reason of the purchase of such ticket, the restrictions or limitations sought to be made must be known to the purchaser, and the ticket must have been accepted with full knowledge of the restrictions contained therein: *Kansas etc. R. R. Co. v. Rodebaugh*, 38 Kan. 45, 5 Am. St. Rep. 715, and extended note thereto discussing the power of a common carrier to limit his common-law liability by general notice.

VARIANCE BETWEEN ALLEGATION AND PROOF is not material unless it misleads the adverse party to his prejudice: Note to *Jordan v. Benwood*, 57 Am. St. Rep. 868; and an immaterial variance between the allegation and proof does not require the reversal of a judgment: *Louisville etc. Ry. Co. v. Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155.

APPEAL—MISSTATEMENT OF FACTS BY COUNSEL.—If counsel persist, in argument, in stating pertinent facts not in evidence, it is good ground for a new trial or a reversal of judgment: See monographic note to *McDonald v. People*, 9 *Am. St. Rep.* 560, discussing the misconduct of counsel in argument.

MOUND v. BARKER.

[71 VERMONT, 253.]

CONTRACTS HAVING ILLEGAL PURPOSE IN VIEW—ENFORCEMENT OF.—When an agreement, innocent in itself, is designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party, nor in favor of the other party, if he is implicated in such design.

CONTRACTS TO FURTHER AN UNLAWFUL PURPOSE—ILLUSTRATION—ENFORCEMENT.—When property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal purpose, and does so use it, the rent therefor cannot be recovered. Hence, if the intention is to sell intoxicating liquors upon the premises, contrary to law, and such liquors are sold thereon, to the knowledge of the lessor, a court will not enforce a bond given by a third party to secure payment of the rent.

Debt on a bond. It was proved by parol evidence that it was the lessee's intention to sell intoxicating liquors in the hotel leased, and that such liquors were sold therein to the knowledge of the lessor. The plaintiff objected to this evidence. The defendant had a *pro forma* judgment for costs and the plaintiff appealed.

Joel C. Baker, for the appellant.

Butler & Moloney and F. S. Platt, for the appellee.

254 ROWELL, J. When an agreement, innocent in itself, is designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party nor in favor of the other party if he is implicated in such design. Thus, when property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal or an immoral purpose and does so use it, the rent therefor cannot be recovered: *Sherman v. Wilder*, 106 *Mass.* 537; *Riley v. Jordan*, 122 *Mass.* 231; *Ernst v. Crosby*, 140 *N. Y.* 364; 2 *Taylor on Landlord and Tenant*,

8th ed., sec. 521; *Jennings v. Throgmorton*, Ry. & M. 251; 21 Eng. Com. L. 744; *Smith v. White*, L. R. 1 Eq. Cas. 625.

Carrigan v. Lycomin Fire Ins. Co., 53 Vt. 418, is not opposed to this, for there the liquors were legitimately used in the plaintiff's drug business, though occasionally sold in violation of law, and no illegal design entered into the making of the policy.

The bond in suit was given by the defendant as surety for the lessees of a hotel, conditioned for the payment by them of the rent reserved, and was executed at the same time as the lease. The lease was innocent in itself, but at the time of its execution and delivery, both the plaintiff, who is the lessor, and the lessees understood and expected that the hotel would be used, not only for the entertainment of guests, but that intoxicating liquor would be sold therein in violation of law; and it was so sold, to the knowledge of the plaintiff. Therefore, if this suit was upon the lease itself, it could not be maintained. It can be maintained no better on the bond, for when the foundation fails, all goes to the ground: *Riley v. Jordan*, 122 Mass. 231.

Judgment affirmed.

CONTRACTS FOR ILLEGAL PURPOSE—VALIDITY OF.—No action can be maintained on a contract growing out of an illegal transaction: *Note to St. Louis etc. Assn. v. Carmody*, 74 Am. St. Rep. 581. Business transactions in violation of law cannot be made the foundation of a valid contract: *Note to Berka v. Woodward*, 73 Am. St. Rep. 39. Courts cannot aid in the enforcement of contracts clearly illegal: *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837; *Swing v. Munson*, 191 Pa. St. 582, 71 Am. St. Rep. 772. A contract designed to defeat the policy of a statute is void: *Note to Brooks v. Cooper*, 35 Am. St. Rep. 806. A contract to rent a house for a purpose forbidden by law is illegal and cannot be enforced: *Milne v. Davidson*, 5 Mart., N. S., 409, 16 Am. Dec. 189.

ANDREWS v. SARGENT.

[71 VERMONT, 257.]

WILLS—CONSTRUCTION—SHIFTING EXECUTORY BEQUEST.—If a testator gives to each of his three daughters one hundred and fifty dollars in certain personal property, in case the legatee marries within eight years from the date of the will, and, if not married within that time, five hundred dollars in cash at the end of the eight years, with a proviso that if either daughter shall die leaving no heirs, her legacy shall be divided among the survivors, such proviso creates a conditional limitation in the sense of a shifting executory bequest, and the time referred to therein by the testator is the time when the legacies become due or payable. Hence, if a daughter dies, without children, before the expiration of the eight years, her estate is cut short and shifted to the survivors; but if all live beyond that period, each takes her share absolutely, and upon her subsequent death, without children, it being agreed that the word "heirs" in the will shall be construed as "children," her share will pass by descent and not to her surviving sisters.

Appeal from probate, taken by Lucy Jane Andrews.

E. J. Ormsbee and J. C. Baker, for the appellant.

Charles L. Howe and Butler & Moloney, for the appellee.

258 TAFT, C. J. The question before us arises upon the construction of the will of David Richardson dated in February, 1847. He died in August following, and soon afterward his will was duly proved. He gave each of his three daughters, Mary Ann, Lucy Jane, and Clarissa B., in case she married within eight years from the date of the will, one hundred and fifty dollars in certain personal property, but, if not married within that time, he gave her five hundred dollars, payable in cash at the end of that period, with this proviso: "6th. It is my will that if either ²⁵⁹ of my daughters should de cease leaving no heirs, that their legacy above named should be divided among such of them as shall survive." It is agreed the word "heirs" shall be construed as "children." Mary Ann married Junia Sargent about 1862, and died in April, 1896, never having had children. Clarissa B. died prior to the de cease of Mary Ann. Lucy Jane survives, and as such survivor claims the five hundred dollar legacy which Mary Ann received in 1882, and which she, during her life, kept intact. If Lucy Jane is not entitled to it, it passed, under the laws of this state, to Junia Sargent, the husband of Mary Ann. The proviso in the will did not create a condition, for upon a con-

dition there can be no gift over to a third person. Conditions can only be reserved for the benefit of the grantor and his heirs. A stranger cannot take advantage of the breach of them: 4 Kent's Commentaries, 127. The proviso created a conditional limitation, a term used in the sense of a shifting executory bequest, the effect of which is to cut short an estate previously created and substitute another in its stead: 4 Kent's Commentaries, 14th ed., 128, note a; Gray's Restraints on Alienation, 2d ed., sec. 22, note 1. Thus, by the will, the bequest is to Mary Ann, but, if she dies unmarried, her estate is cut short and shifted to the survivor or survivors. One estate is cut short and another substituted in its place. The important question is, To what time did the testator refer in the clause "if either of my daughters should decease leaving no heirs (children)," etc.? Was it the time the legacies were payable, or at some indefinite time thereafter? The estate vested in interest upon the death of the testator, subject to be divested in case the legatee died, leaving no children, before the eight years elapsed, that being the time when the legacy became payable. We hold that the words in the proviso, "if either of my daughters should decease leaving no heirs (children)," etc., refer to the time when the legacies became due; when they vested in possession, at the expiration of eight years from the date of the will. Such ²⁰⁰ was the manifest intent of the testator. The language of the sixth clause indicates such intent: "It is my will that if either of my daughters should decease leaving no heirs (children) that their legacy above named should be divided among such of them as shall survive." It is a direct reference to the time the bequests become payable. There is nothing in the will to indicate an intent to create a life estate in the five hundred dollars, in those dying leaving no children. It is natural to suppose the testator intended a benefit to those rearing children. Two of the daughters might have reared large families, but if they survived their children and died before the third sister, who may have remained unmarried, the latter would take the legacies of the mothers, and the whole fund pass to the childless. The manifest intent of the testator was, that at the end of the eight years the three legacies of fifteen hundred dollars should be divided among the survivors of the three daughters in case the deceased ones left no children.

The record discloses the fact that the testator had three

daughters and two sons; and it is fair to infer from the facts stated that the sons took the estate valued at more than ten thousand dollars and paid the legacies due the daughters, viz., the fifteen hundred dollars. Is it probable the testator would give his daughters the small legacy specified and limit their interest to life estates unless they, at the end of what might be a long life, had children surviving them? We think not. It was for the reason of supporting the will of the testator that executory devises or bequests were instituted, for when it was evident that the testator intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise or bequest: 4 Kent's Commentaries, 264.

Judgment affirmed and ordered certified to the probate court.

EXECUTORY DEVISE LIMITED ON A FEE SIMPLE.—A devise was made in these words: "I give unto my three sons, A, B, and C, all my other lands, etc. Also, my will is that if either or any of them should die without children, the survivor or survivors to hold the interest or share of each or any of them so dying without children as aforesaid." It was held that an estate in fee simple passed, determinable on the contingency of the children dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise: *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24. Compare *Spruill v. Moore*, 5 Ired. Eq. 284, 49 Am. Dec. 428; *Combs v. Combs*, 67 Md. 11, 1 Am. St. Rep. 359.

NEW ENGLAND FIRE INSURANCE CO. v. HAYNES.

[71 VERMONT, 306.]

LIMITATIONS OF ACTIONS—DEMAND NOTE—WHAT IS NOT.—A note given to a corporation, in payment for stock, is not a note payable on demand, where it is "payable in such installments and at such times as the directors may require, notice thereof being published agreeably to the charter," which requires thirty day's publication in a newspaper. The statute of limitations does not, therefore, begin to run on such a note from its date.

LIMITATIONS OF ACTIONS—DEMAND—REQUIREMENT AS TO TIME.—If it is apparent, from the terms of a note, that delay in making demand was expressly contemplated by the parties, there is no rule of law which requires that demand should be made within the statutory period for bringing an action.

ESTOPPEL—TAKING ADVANTAGE OF ONE'S OWN FRAUD.—A person who gives a note to an incorporated insurance company for the purpose of enabling the corporation to deceive the insurance commissioners of the state as to the company's financial condition, is estopped from taking advantage of his own fraud when sued upon the note by the company.

CORPORATIONS—LEGALITY OF CALLS FOR INSTALLMENTS OF "STOCK NOTES."—A call by the directors of a corporation for the several installments of a note given to it in payment for stock is not invalid by reason of the company's failure to elect fifteen directors for the years in which such calls were made, where the charter provided that there should not be less than seven, nor more than fifteen, directors, and, at all times in question, the company had more than seven, and more than a majority of fifteen participated in the vote of the board declaring the installments payable.

Assumpsit. There was a judgment for the plaintiff and the defendant appealed.

George E. Lawrence, for the appellant.

Butler & Moloney, for the appellee.

307 THOMPSON, J. The plaintiff is an insurance company incorporated by No. 176, Statutes of 1880. It seeks to recover upon the following note, executed and delivered to it by the defendant. "\$900. Rutland, Vt., Feb'y 9th, 1885. For value received, I promise to pay to the 'New England Fire Insurance Co.,' at its office in Rutland, Vt., nine hundred dollars, payable in such installments and at such time or times as the directors may require, notice thereof being published agreeably to the charter." This note was given for twenty shares of stock of the plaintiff company, first issued to the Atlas Guaranty Company, and by it duly transferred and delivered to the defendant. At the time the note in question was given, a part of the assets of the plaintiff consisted of notes commonly referred to as "stock notes," being notes given for its stock by holders thereof, and of similar tenor and import to the note in suit. The makers of these "stock notes" were liable to pay the same whenever assessments were voted thereon by plaintiff's directors, pursuant to its charter and by-laws. Among the "stock notes" so held by the plaintiff was one for nine hundred dollars made by the Atlas Guaranty Company, and given for the stock assigned and delivered to the defendant. This note was surrendered to the maker by the plaintiff at the time the ³⁰⁸ defendant's note was taken, and his note was taken in lieu of the note so surrendered. The

defendant then understood that his note was to take the place of the Atlas Guaranty Company's note in the assets of the plaintiff. From its language, as well as the circumstances under which it was given, the note in suit was in effect the same as the other "stock notes." Assessments were made on this note as follows: July 30, 1892, ninety dollars, payable September 15, 1892; December 26, 1894, one hundred dollars, payable February 1, 1895; and March 1, 1895, seven hundred and ten dollars, payable April 15, 1895. Notice was given of each assessment by publication in the "Rutland Herald," a newspaper printed in Rutland, agreeably to the requirements of the charter. The writ is dated September 6, 1895.

1. The defendant insists that this action is barred by the statute of limitations, on the ground, as he claims, that the note in suit in legal effect is a note payable on demand, and that the statute began to run thereon from its date, although no demand was in fact made within six years from its date. Undoubtedly, in the case of a note payable on demand the contention of the defendant is correct. But when delay in making demand is expressly contemplated, there is no rule of law that requires that demand should be made within the statutory period for bringing an action. Where a promissory note made payable "three months after demand" was sought to be enforced more than twenty years after its date, it was held that as no demand had been made until within six years next before bringing the action, the statute had not run thereon: Wood on Limitations of Actions, 256, 257; *Stanton v. Stanton*, 37 Vt. 413.

In *Stanton v. Stanton*, 37 Vt. 413, it is said that "when the instrument itself indicates that the calls for payments were to be indefinitely prospective, and to be made as might suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and ³⁰⁹ therefrom give operation to the statute of limitations." The note in suit refers to the charter to determine when the installments called for by the directors should become due and payable. Section 6 of the charter, among other things, provided that "securities," which included "stock notes," should be payable in such installments and at such time or times as the directors might require, notice thereof being published in some newspaper printed in Rutland, at least thirty days previous to

the time when such installment was declared to be payable. By the express terms of the defendant's note, no installment nor part thereof was to be due until a time after demand should be made by such publication. These "stock notes" were treated as a fund for the benefit of the creditors of the plaintiff. It is apparent from the terms of the note that delay in making demand was expressly contemplated by the parties, and that the calls for payments were to be indefinitely prospective, and were to be made as might suit the wants and convenience of the plaintiff as the same should thereafter be determined by its business needs, and consequently the statute of limitations would not begin to run upon the installments, until the time fixed for payment by the call of the directors and the publication of notice agreeably to the charter. This contention of the defendant, therefore, cannot prevail, as this action was brought within six years of the time when the first installment became payable. This holding is not opposed to *Lycoming Fire Ins. Co. v. Batcheller*, 62 Vt. 148, which recognizes the doctrine that the statute of limitations begins to run when the plaintiff first can sue on the claim in question.

The defendant also contends that, if the statute did not begin to run from the date of the note, it began to run at the expiration of a reasonable time in which to call for payment and to publish notice of such call pursuant to the terms of the note, and that such reasonable time had elapsed more than six years before the commencement of ³¹⁰ this suit. If it were the law that the demand must have been made within a reasonable time (which we do not decide), to render this claim effective in his behalf, it would be incumbent on the defendant to show, as a matter of fact, when such reasonable time expired, or to show a state of facts upon which the law would assume a limit to such reasonable time: *Stanton v. Stanton*, 37 Vt. 413. The record does not show such a finding, as a matter of fact, by the trier, nor does it disclose such facts as enable this court to say, as a matter of law, when such reasonable time would expire. Hence, on this view of the matter, it cannot be held that the note is barred by the statute of limitations.

2. It is not necessary to decide whether it was error to admit parol evidence to show what occurred between Redington and the defendant when the latter gave the note to the plaintiff, for the facts found on such evidence cannot avail the

defendant by way of defense to this action. Such facts show that he gave the note for the purpose of enabling the plaintiff to deceive the insurance commissioners of this state in respect to its then financial condition, and he is estopped from taking advantage of his own fraud in this behalf: *Grand Isle v. Kinney*, 70 Vt. 381.

3. The call by the directors for the several installments was not invalid by reason of the failure of the plaintiff to elect fifteen directors for the years in which such calls were made. The charter provided that there should be not less than seven, nor more than fifteen, directors. At no time did it elect less than seven directors, and at all times in question it had more than seven, and more than a majority of fifteen directors participated in the vote of the board declaring the installments payable: *Wright v. Commonwealth*, 109 Pa. St. 560.

Judgment affirmed.

LIMITATIONS OF ACTIONS.—IF A DEMAND on the defendant is requisite to give a right of action, the statute of limitations does not begin to run until such demand is made: *Note to Barnes v. Glide*, 59 Am. St. Rep. 159. Compare *Lincoln v. Purcell*, 2 Head, 143, 73 Am. Dec. 196.

ESTOPPEL—FRAUD.—That a party is estopped from setting up his own fraud, see *Marston v. Kennebec etc. Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412.

DOW v. TAYLOR.

[71 VERMONT, 337.]

CONTRACTS FOUNDED PARTLY ON AN ILLEGAL CONSIDERATION—VALIDITY OF.—If a contract is made in part on an illegal consideration, the whole contract is void. Hence, if a defendant, by giving an order, assigns money due, and to become due, to him from his debtor, partly in consideration of a debt honestly due and owing from the assignor to the assignee, but partly given for the purpose of preventing other creditors trusteeing, and to enable the assignee to take out of the assignor's monthly pay such sum as the debtor sees fit to let him take, the contract, to the extent of the debt, is founded upon a valuable consideration, but beyond this it is in contravention of the statute against fraudulent conveyances and illegal. The whole assignment is therefore void, and the debtor is liable upon trustee process.

ATTACHMENT — TRUSTEE PROCESS — NOTICE—DUTY OF TRUSTEE.—The service of trustee process is sufficient notice to the trustee that the ownership of funds in his hands is in question, and he should, for his own protection, await the judgment

of the court thereon before paying the funds to anyone. Not to do so is to act at his peril.

WITNESSES — CROSS-EXAMINATION — CONSIDERATION FOR ASSIGNMENT.—Upon the examination of a claimant in trustee process, where the plaintiff contends that the defendant assigned to the claimant money due him in fraud of creditors, and that the assignment was, therefore, invalid as to attaching creditors by trustee process, it is proper for the plaintiff to cross-examine the claimant concerning the consideration upon which the assignment was made.

Trustee process. The defendant, Taylor, gave to the claimant, and defendant, Henderson, an order directing the payment to the claimant of all the defendant's wages then due and afterward to become due, while in the employ of the trustee, the Montpelier & Wells River Railroad. The trustee was adjudged liable, and he and the claimant appealed.

J. P. Lamson, for the trustee.

Smith & Sloane, for the appellee.

338 WATSON, J. The plaintiff contended before the commissioner that the order was given by the defendant to the claimant in fraud of creditors and therefore, as against attaching creditors by trustee process, invalid. As bearing upon this question, the cross-examination of the claimant by the plaintiff's counsel was proper. The claimant, by procuring the trustee's acceptance of the order and lodging the same in its office, notified the trustee of the assignment of the demand due from it, here sought to be held by the claimant. The validity of that assignment was brought in question by the plaintiff, and, under the provisions of section 1370, V. S., he had a right thus to examine the claimant concerning the consideration upon which the assignment was made.

At the time the order was given, the defendant was owing the claimant about twelve dollars for money previously borrowed, and wanted to borrow more money, and the claimant demanded security, whereupon the order was given and the claimant let the defendant have twenty dollars more. Thereafter the claimant drew all of defendant's pay from the trustee and therefrom let the defendant have what money he wanted, from time to time, 339 and kept the rest himself. The amount in the hands of the trustee at the time of the service of the trustee process upon it was thirty-three dollars and twenty-two cents, but whether it was enough to pay the claim-

ant in full did not appear. The trustee subsequently paid this money to the claimant. The claimant drew defendant's pay from the trustee five times on the order and in all over two hundred dollars.

The commissioner has found "that the order was given for the purpose, among other things, of preventing other creditors trusteeing, and to enable the claimant to take out of the monthly pay such sum as the debtor saw fit to let him take." To the extent of the debt honestly due and owing from the defendant to the claimant, the contract of assignment was made on a valuable and legal consideration, but beyond that, as appears by the above finding, the consideration was in contravention of the statute against fraudulent conveyances (V. S., secs. 4965, 4966), and illegal; and the contract being made in part on an illegal consideration, the whole contract is void: Chitty on Contracts, 730; Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Shelley v. Boothe, 73 Mo. 74, 39 Am. Rep. 481; Roberts v. Barnes, 127 Mo. 405, 48 Am. St. Rep. 640; Baldwin v. Short, 125 N. Y. 553.

The trustee had no information but that the order was what it purported to be on its face, but this was no legal excuse for paying over the funds in its hands to the claimant, after service of the trustee process upon it. The service of that process was a sufficient notice that the ownership of those funds was in question, and, for its own protection, it should have awaited the judgment of the court thereon, before paying the funds to anyone. Not so to do was to act at its peril: Wheeler v. Winn, 38 Vt. 122. The case is clearly within the provisions of section 1370, V. S., and judgment must be affirmed.

CONTRACTS — CONSIDERATION PARTLY ILLEGAL — VALIDITY.—If any part of a consideration is illegal, the whole contract is void: Note to St. Louis Fair Assn. v. Carmody, 74 Am. St. Rep. 580.

LOCKE v. POST.

[71 VERMONT, 343.]

HOMESTEAD—EXEMPTION OF PROCEEDS OF.—Under a statute excepting from trustee process the proceeds of property exempt from attachment at the time of its sale, the proceeds of a homestead are not subject to attachment by trustee process. The exemption depends upon whether the property was, at the time of its sale, exempt from attachment, and is not dependent upon the debtor's continuing to be a housekeeper, or upon his intention to acquire another homestead, or upon the intent with which he keeps the proceeds.

John Young and W. W. Miles, for the appellant.

E. A. Cook and J. W. Redmond, for the appellees, the trustee and claimant.

³⁴⁴ **START, J.** The defendant, on the twenty-first day of March, 1895, was the owner of a homestead, and on that day sold and conveyed the same to the trustee and took in payment therefor the notes sought to be charged by the trustee process. On the twenty-fifth day of March, 1895, he broke up house-keeping and has not since been a housekeeper. The plaintiff insists that, inasmuch as the defendant has not been a housekeeper or head of a family since he parted with his homestead, and inasmuch as it does not appear that he has kept the proceeds of the homestead to use in buying another, the same are subject to attachment by trustee process.

It was not necessary for the defendant to continue a housekeeper after he had sold his homestead, in order to exempt the notes from attachment by trustee process; nor was it necessary that he should keep the notes with an intention of using them in buying another homestead; nor was it necessary that he should have had such intention at ³⁴⁵ the time the trustee process was served. The statute does not require the proceeds to be kept, under the same conditions that an unoccupied homestead is kept, in order to exempt them from trustee process. The statute provides that no person, except as therein otherwise provided, shall be liable on trustee process, on account of a sum due or owing to the principal debtor for property sold or conveyed or delivered to him, which was at the time of sale exempt from attachment and execution: V. S., sec. 1313.

The homestead was exempt from attachment and levy upon execution, and the only provision of the statute which relates to the attachment of the proceeds of the homestead that has any application to this case is section 1313. By this section the exemption is in no way dependent upon the debtor's continuing to be a housekeeper, nor upon his intention to acquire another homestead, nor upon the intent with which he keeps the proceeds. The liability of the trustee is made to depend upon whether the property was, at the time of sale, exempt from attachment and levy upon execution. The sum due and owing from the trustee to the principal defendant being for property sold which was, at the time of the sale, exempt from attachment and levy upon execution, the trustee is not chargeable.

Judgment affirmed.

EXEMPTION OF PROCEEDS OF HOMESTEAD.—That the proceeds of the sale of a homestead are not exempt from attachment or execution, unless the vendor has, at the time of the sale, the intention of investing them in another homestead, see notes to *Morgan v. Rountree*, 45 Am. St. Rep. 238; *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188. If he has such intention, the proceeds are exempt: *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216.

MURTEY v. ALLEN.

[71 VERMONT, 377.]

EVIDENCE—JUDICIAL NOTICE OF LAWS OF OTHER STATES.—The courts of one state cannot take judicial notice of the constitution or statutes of another state, nor of their interpretation by the courts of that state.

ACTIONS—LAW GOVERNING FORM OF AND PROCEDURE.—The form of a remedy and the mode of proceeding are governed by the laws of the place where the action is instituted.

STATUTES—EXTRATERRITORIAL FORCE OF.—The laws of one state, which prescribe a specific remedy for enforcing a liability, have no extraterritorial force, and the courts of another state are not bound to enforce them.

FOREIGN RECEIVERS—RIGHTS OF.—In Vermont, a foreign receiver, who seeks to enforce against a resident of that state a liability arising under the laws of the state of his appointment, is confined to the remedy given him by the common law.

FOREIGN RECEIVERS—SUIT BY.—A foreign receiver cannot maintain an action at law, in his own name, without having the legal title to the matter or thing in controversy.

RECEIVERS—LEGAL TITLE.—The title to property is not changed by the appointment of a receiver.

FOREIGN RECEIVERS—ENFORCING A LIABILITY FOR THE BENEFIT OF CREDITORS.—A foreign receiver, who seeks to enforce in this state, against a resident thereof, a liability for the benefit of creditors arising in the state of his appointment, cannot maintain an action at law in his own name for such purpose, where his declaration fails to show legal title in himself.

Butler & Moloney, for the appellant.

F. S. Platt and J. C. Baker, for the appellee.

380 **WATSON, J.** The plaintiff, as receiver of the Commercial Bank of Weeping Water, in the state of Nebraska, under an appointment by the district court within and for the county of Cass, in the state of Nebraska, in a proceeding in which the state of Nebraska is complainant and the said bank is defendant, has brought his action of debt against the defendant, a resident of this state, and an alleged stockholder in said bank, to enforce an alleged liability existing against him by force of section 7 of article 11 of the constitution of the state of Nebraska, which reads: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

The first count of the declaration was waived by the plaintiff in the county court, and to the other two counts the defendant interposed a general demurrer, which was sustained by the county court, and upon exceptions thereto by the plaintiff, the case is here upon the sufficiency of the declaration.

In determining the questions involved, we are confined to the averments in the declaration, and cannot take judicial notice of the constitution or statutes of the state of Nebraska, nor of their interpretation by the highest court in that state: *Hartland v. Windsor*, 29 Vt. 354; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414.

Assuming the liability under the constitutional provision in question to be contractual in nature, and to be construed by the laws of Nebraska, the form of remedy, and the mode of proceeding, are regulated by the laws of the place where the action is instituted: *Story on Conflict of Laws*, sec. 556; *Harrison v. Edwards*, 12 Vt. 648, 36 Am. Dec. 364; and if the constitution or statutes of the state of Nebraska contain provisions

381 prescribing a specific remedy for enforcing this liability, such provisions have no extraterritorial force and we are not affected thereby: 2 Morawetz on Corporations, sec. 876.

The statutes of this state contain no provisions creating any new remedy at law, or enlarging or changing the common-law remedy, if such exists, upon such a constitutional or statutory liability. In that regard, a receiver has no remedy at law, other than such as is given him by the common law.

It is fundamental that, to authorize a party to sue at law in his own name, he must have the legal title to the matter or thing in controversy, and no exception to this rule exists, at common law, as to suits brought by a receiver. He can maintain an action at law in his own name only when he has in himself the legal title: High on Receivers, sec. 220; Newell v. Fisher, 24 Miss. 392; Yearger v. Wallace, 44 Pa. St. 294.

A receiver derives his authority from the court appointing him, and his possession of property and property rights is the possession of the court for the benefit of whomsoever the same shall ultimately be adjudged to belong. The title thereto is unchanged: Chicago Union Bank v. Kansas City Bank, 136 U. S. 236.

The liability under the constitutional provision upon which this action is based is for the benefit of creditors, and the allegations in the declaration do not show the receiver to have such a legal title as will enable him to maintain an action at law in his own name, in this state, for its enforcement.

Judgment affirmed.

JUDICIAL NOTICE will not be taken of the laws of another state: Note to Schultz v. Howard, 56 Am. St. Rep. 474.

ACTIONS.—THE FORM OF REMEDIES and the order of judicial proceedings are to be according to the law of the state where the action is instituted: La Selle v. Woolery, 14 Wash. 70, 53 Am. St. Rep. 855.

THE STATUTES OF ANOTHER STATE have, *ex proprio vigore*, no force or effect in this, and, if enforced at all in its courts, it is on the ground of comity: See Marshall v. Sherman, 148 N. Y. 9, 51 Am. St. Rep. 654, showing when the courts of one state will not enforce the laws of another, creating a personal liability against the stockholders of a corporation organized and doing business in the latter state.

FOREIGN RECEIVERS—SUITS BY.—The title to property is not changed by the appointment of a receiver: Note to American etc. Bank v. McGettigan, 71 Am. St. Rep. 353; and a receiver has, as a general rule, no power, as a matter of right, to bring suits in the courts of other states regarding matters pertaining to his receivership. His power to do so arises from comity merely, unless there is a special statute authorizing such suits: Notes to Wilson v. Keels, 71 Am. St. Rep. 821; Wyman v. Eaton, 70 Am. St. Rep. 197.

HOWARD v. CLARK.

[71 VERMONT, 424.]

APPEAL—MASTER'S FINDING—CONCLUSIVENESS OF.—A master's finding that the description of land in a mortgage includes land already mortgaged to another is conclusive.

MERGER OF LEGAL AND EQUITABLE ESTATES.—A CONVEYANCE OF THE EQUITY OF REDEMPTION to a mortgagee does not, as a general rule, constitute a merger of the legal and equitable estates, when, from all the circumstances, it is apparent that the best interests of the mortgagee require the two estates to be kept separate, unless it is found that such was the intention of the mortgagor. The intention of the mortgagee governs, and when his intention to merge the two estates is established, it controls.

MERGER OF LEGAL AND EQUITABLE ESTATES—FRAUD—DEED OF EQUITY OF REDEMPTION.—There is no merger of legal and equitable estates where the mortgagee takes a deed of the equity of redemption from the mortgagor, notwithstanding the intention of the mortgagee that it shall be in payment and discharge of the mortgage debt, if the mortgagee is fraudulently led by the mortgagor to believe that the premises are free of encumbrance, and accepts the deed under a mistaken belief that the premises are not encumbered.

NOTICE AS TO ENCUMBRANCES—EXAMINING RECORD—DUTY—NEGLIGENCE.—A record of a subsequent mortgage is not constructive notice to a prior mortgagee; and, as no duty rests upon a prior mortgagee to examine the records for subsequent encumbrances, he is not guilty of negligence in failing so to do.

EQUITY—EQUALITY—MORTGAGEE AND MORTGAGOR.—In restoring one to his rights as senior mortgagee, equality is equity, and the mortgagor must, therefore, be restored, so far as possible, to his rights as mortgagor, with the privilege of redeeming.

MORTGAGES—REINSTATEMENT AS SENIOR MORTGAGEE—OBJECTIONS.—A subsequent mortgagee, who had both constructive and actual notice of the prior encumbrance when he took his own, cannot object to one's being restored to his rights as senior mortgagee, because he suffers no injustice thereby.

Petition in chancery brought by the orator, Howard, to set aside a mortgage given by the defendant, Jed P. Clark, to the defendant, Henry O. Clark, and a quitclaim deed given by Jed P. Clark to Howard, to foreclose a mortgage given by Jed P. Clark to Howard, and to enjoin the defendant, Teachout, from conveying the premises. The mortgage from Jed P. Clark to Howard was executed on December 10, 1883. This mortgage was given on premises called the "Barnum Farm," at that time unencumbered. On February 14, 1885, Jed P. Clark executed a mortgage of the same premises, together with other real estate, to secure the grantees therein from liability as his bonds-

men. On September 8, 1892, Jed P. Clark executed a mortgage to Henry O. Clark of certain lands, which included the "Barnum Farm." This mortgage contained a covenant of warranty that the premises were free from all encumbrances. On March 21, 1893, as Howard was about to foreclose his mortgage, an arrangement was made between him and Jed P. Clark whereby the latter conveyed the "Barnum Farm" to the former by quitclaim deed. The deed was drawn by a conveyancer and delivered to Howard, and the latter's notes were left with the conveyancer to be delivered to Jed P. Clark whenever the mortgage to the bondsmen should be discharged. The mortgage to the bondsmen was discharged by their quitclaim deed of July 25, 1893, but the notes were not delivered up because they were not called for, and nothing further was done to discharge the mortgage of Jed P. Clark to Howard. During all this time, Howard had no knowledge of the deed to Henry O. Clark, as Jed P. Clark had not mentioned it, and Howard did not consult the record. In fact, Howard was led to believe that the premises were free of encumbrances, except the mortgage to the bondsmen. Howard took possession of the premises and contracted to sell them to one Murray, who took possession under his contract but received no deed. Murray sold his interest to Teachout, to whom Howard afterward conveyed the premises by warranty deed, being still ignorant of the mortgage to Henry O. Clark. Teachout went into possession, divided the farm into lots, and developed the property for building purposes. The bill was dismissed as to the defendant Teachout, with costs and without prejudice, but there was a decree pro forma, for the orator against the defendants Clark, who appealed.

Powell & Powell, for the appellant, Henry O. Clark.

C. W. Witters, for the appellee.

427 WATSON, J. The orator's mortgage covers only the "Barnum Farm"; and the mortgage to the defendant Henry O. Clark covers land described in the deed as "all lands owned by said Jed P. Clark between Lamoille river and the highway running from the residence of C. D. Ladd to the foot of the hill at Milton Lower Falls, so called." The master has found that the description in the mortgage to Henry O. was much more extensive than the limits of the "Barnum Farm," but included it, and was so understood by the parties. This find-

ing is conclusive, and the mortgage must be construed and considered accordingly.

The important question for consideration is the effect of the conveyance of the equity of redemption in the "Barnum Farm" by the mortgagor to the orator, under the facts and circumstances disclosed by the master's report. Was the effect to merge the legal and equitable estates, and, if it was, is the orator entitled to relief in equity?

As a general rule the conveyance of the equity of redemption to a mortgagee will not constitute a merger of the legal and equitable estates, when from all the circumstances it is apparent that the best interests of the mortgagee require the two estates to be kept separate, unless it is found that such was the intention of the mortgagee. The intention of the mortgagee governs, and when his intention to merge the two estates is established, it controls: *Belknap v. Denison*, 61 Vt. 520; *Carpenter v. Gleason*, 58 Vt. 244; *Walker v. Barker*, 26 Vt. 710.

The master has found that it was intended by the orator and mortgagor to pay and discharge the orator's debt by the deed of the equity of redemption, and it is contended by the defendant, Henry O., that this, in effect, is a finding of an intention by the orator to merge the two estates, and that making the mortgage of Henry O. the first encumbrance ⁴²⁸ upon the property is but the legal effect or result of the orator's intentional act, from which a court of equity can grant no relief without annulling the very contract intentionally and understandingly entered into by the parties: *Proctor v. Thrall*, 22 Vt. 262. But this finding is to be considered in connection with the further findings that the orator had no knowledge of the mortgage to Henry O., and that the mortgagor then led the orator to believe, and he did believe, that the premises were free from encumbrance, except the mortgage to the bondsmen, and that he would not have abandoned his foreclosure proceedings and concluded the arrangement then made, had he believed otherwise. The record of Henry O.'s mortgage was not constructive notice to the orator, and no duty rested upon him to examine the records for subsequent encumbrances (*Johnson v. Valido Marble Co.*, 64 Vt. 337), and therefore he was not guilty of negligence in failing so to do. The mortgagor had full knowledge of the mortgage to Henry O., and that it covered the "Barnum Farm": he had no equity of value in the farm, and he was personally holden to the orator for the pay-

ment of the debt secured by his mortgage; he was also personally holden to Henry O. for the payment of the debt secured by mortgage to him, which he knew amounted to several times the value of the farm; and he knew that to give the orator a deed of the equity of redemption, in payment and discharge of his debt, and thereby make Henry O.'s mortgage a first encumbrance upon the farm, was to pay and discharge the debt without any consideration of value moving to the orator therefor, and that he would thereby be relieved from personal liability thereon. Under those circumstances, for the mortgagor to lead the orator to believe the premises free from encumbrance, except the mortgage to the bondsmen, to induce him to accept the deed of the equity of redemption in payment and discharge of his debt, was to obtain ⁴²⁹ possession of the orator's notes as paid and discharged, by fraudulent means, and with this fraud thus established, the fact found as to the intention of the orator is rendered without force, and a court of equity will relieve the orator from the unconscionable position in which this fraud has placed him, by reinstating him in his rights under his notes and mortgage as they existed before the taking of the deed: 2 Jones on Mortgages, secs. 966, 967.

And because of the fraud practiced upon the orator when he took the deed, he was laboring under such a misapprehension of the material facts relative to the subject matter which entered into the transaction, as also to entitle him to relief in equity on the ground of mistake: 2 Jones on Mortgages, sec. 969.

But equality is equity, and, in granting relief to the orator, the defendant Jed P. must, so far as possible, be restored to his rights as mortgagor with the privilege of redeeming the premises by paying the orator the sum found due in equity upon his mortgage with costs of suit, within such time as may be fixed by the court of chancery for that purpose.

Notwithstanding the fact that the mortgage to Henry O. contained a covenant of warranty that the premises were free from all encumbrance, he not only had constructive notice of the orator's mortgage, but he had knowledge in fact that the orator's debt was past due and unpaid and that the mortgage securing the same was in life and undischarged. His mortgage when made, as to the "Barnum Farm," was only upon the equity of redemption, and such it is with the orator reinstated in his rights under his mortgage. His position is in nowise

changed, and he cannot object to the orator's being restored to his rights as senior mortgagee, when he himself suffers no injustice thereby: 1 Jones on Mortgages, sec. 967.

The equitable adjustment of the rights of the defendant Teachout may involve the consideration of matters not ⁴³⁰ now before the court, and, as to him, this case should be so disposed of as not to prejudice his rights in the premises.

Decree reversed and cause remanded with mandate that the orator's notes and mortgage be and are in full force, and the mortgage reinstated as senior encumbrance upon the "Barnum Farm," so called; that the quitclaim deed of the equity of redemption from the defendant Jed P. Clark to the orator be and is null and void; that the bill be dismissed with costs and without prejudice as to the defendant Edgar D. Teachout; that the orator's mortgage be foreclosed as against the defendants Jed P. Clark and Henry O. Clark, with the right in the said Jed P. and Henry O. to redeem the premises therefrom within a time to be fixed by the court of chancery; and that the orator recover his costs of the said Jed P. Clark and Henry O. Clark.

MERGER OF LEGAL AND EQUITABLE ESTATES—EQUITY OF REDEMPTION.—A mortgagor and a mortgagee may agree that the latter shall be entitled to the mortgaged property in consideration of his release of the debt: Note to Hall v. Hall, 44 Am. St. Rep. 699; but a conveyance of the equity of redemption to a mortgagee does not merge the legal and equitable estates unless the mortgagee intends such a merger: Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290. A merger does not occur where a mortgagee purchases the equity of redemption, if it is to his advantage to keep the mortgage alive, and it can be done without prejudicing the rights of the mortgagor or third persons: Notes to Boos v. Morgan, 30 Am. St. Rep. 245; Clark v. Glos, 72 Am. St. Rep. 236. The purchase of a senior mortgage by the purchaser of the equity of redemption to protect his title does not create a merger so as to extinguish the lien of the mortgage in favor of the intermediate mortgagee: Note to Boos v. Morgan, 30 Am. St. Rep. 245.

THE REGISTRATION OF A CONVEYANCE OR ENCUMBRANCE IS CONSTRUCTIVE NOTICE only to subsequent purchasers and encumbrancers: Note to White v. McGregor, 71 Am. St. Rep. 880. One holding a mortgage on real property is not affected by subsequently recorded conveyances of parts thereof of which he had no actual notice: Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108. The recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage: Cheesebrough v. Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494.

FERRY v. MILTIMORE ELASTIC STEEL CAR WHEEL
COMPANY.

[71 VERMONT, 457.]

FOREIGN JUDGMENTS—ACTION ON—PLEADING—JURISDICTION—PRESUMPTION.—In an action of debt upon a judgment of a court of a sister state, it is not necessary to aver that such court had jurisdiction either of the subject matter or of the parties. The jurisdiction of such court is open to inquiry, but the question of jurisdiction cannot be raised by a general demurrer to the declaration, and it will be presumed that the court had jurisdiction until the contrary is shown by proof under a proper plea.

Debt. A demurrer to the declaration was sustained and the plaintiffs appealed.

F. G. Swinington, for the appellants.

Barber & Darling, for the appellees.

458 TYLER, J. The declaration is in debt upon a judgment rendered by the circuit court of Cook county, Illinois, March 15, 1897. It alleges that the defendants are residents of this state, but it does not allege that they ever were residents of Illinois, nor that they were served with process summoning them to appear in said cause, nor that they appeared therein, nor that that court in any manner obtained jurisdiction of them, nor that it had jurisdiction of the subject matter of the suit. The case here stands upon a general demurrer to the declaration.

It is well settled by the decisions of this court and by those of the supreme court of the United States that it is competent for a defendant to contradict and impeach the judgment of a court of another state by proof that that court had not jurisdiction of the matter in controversy, or that the judgment was rendered without the defendant's appearance or notice to him to appear: *Wood v. Augustins*, 70 Vt. 637; *Grover etc. Sewing Machine Co. v. Radcliffe*, 137 U. S. 287. The defendant does not controvert this rule of law, but contends that the question of jurisdiction cannot be raised by general demurrer.

It would be more in compliance with the requirement of the constitution of the United States that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and with the **459** acts of Congress passed in pursuance thereof, and more in accord with

the spirit of comity that exists between the courts of the different states, to presume that the Illinois court had proper jurisdiction until the contrary is shown by proof under a proper plea, than to require the plaintiff to allege these jurisdictional facts in his declaration.

We have been referred to no case decided by the United States supreme court and have found none which aids us upon this question of pleading. The cases go no further than to declare that under the constitution and laws of the United States a judgment or decree of one state, made by a court having jurisdiction of the parties and the subject matter, has the same force when pleaded or offered in evidence in the courts of any other state as in the state where it was rendered: *Cheever v. Wilson*, 9 Wall. 108; *Chew v. Brumagen*, 13 Wall. 497; *Mutual Life Ins. Co. v. Harris*, 97 U. S. 331.

In *Thompson v. Whitman*, 18 Wall. 457, it was held that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding. In that case, under a law of the state of New Jersey by which non-residents were prohibited from raking clams and oysters in the waters of that state, and two justices of the county in which the seizure of the vessel was made were authorized upon information to try and determine the case, it was held that it might be shown by parol evidence that the seizure was not made in the county where the prosecution was held.

It is laid down in the text in 11 Encyclopedia of Pleading and Practice, 1131, that the jurisdiction of a superior common-law court is presumed unless the contrary appears, and therefore in an action upon a judgment of such a court, although of a foreign or a sister state, it is not necessary to aver that such court had jurisdiction either of the subject matter or of the person. A large number of cases are cited in the notes as ⁴⁶⁰ sustaining this rule, among them *Wilbur v. Abbot*, 58 N. H. 272; *Mink v. Shaffer*, 124 Pa. St. 280; *Jarvis v. Robinson*, 21 Wis. 524. The rule in Massachusetts is that the record of the judgment of another state is prima facie evidence that the court had jurisdiction of the defendant, but that it is open to the defendant to prove that he did not appear in person or by attorney in the action in which the judgment was rendered: *Bissell v. Wheelock*, 11 Cush. 277; *Wright v. Andrews*, 130 Mass. 149.

In 12 Encyclopedia of Pleading and Practice, 173, it is stated as the general rule, "that nothing shall be intended to be out

of the jurisdiction of courts of superior general jurisdiction but that which especially appears to be so; with such courts the record need not affirmatively show jurisdiction, and, when silent upon the point, every intendment is in favor of their jurisdiction." The rule seems to have been deduced from decisions of courts of last resort in most of the states, though it has sometimes been held that the declaration must affirmatively allege jurisdiction. On page 186, same volume, it is stated that when the want of jurisdiction appears on the face of the record, the objection may be raised by demurrer, motion to dismiss or motion in arrest, but if the want of jurisdiction does not thus appear the objection should be taken by answer or plea in abatement. Under the practice in this state, however, a motion to dismiss is not available: *Marsh v. Graves*, 68 Vt. 400.

In *Fullerton v. Horton*, 11 Vt. 425, the action was debt upon a judgment of the court of common pleas, Middlesex county, Massachusetts. It appeared by the record that the defendant was set up as of Acton in that county, while the officer's return showed the attachment of certain lands in the county where he resided, and that a summons was left at his last and usual abode in Stowe in the same county. The defendant demurred for that the record did not show notice to him of the original action. It was held that, while the judgment might be inquired into under any proper plea, ⁴⁶¹ a demurrer did not raise the question; that full faith, credit, and effect must be given to the record, and that it did not appear that the court had not jurisdiction. The court remarked that if the defendant were to show that he did not then reside in Massachusetts, then notice to him should clearly and affirmatively appear, for "a resident of one state ought not to be subject to the jurisdiction of another, unless it affirmatively appear that he had notice." This is in accordance with the holding in *Galpin v. Page*, 18 Wall. 350, that: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. It is a rule as old as the law, and never more to be re-

spected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Neither of the above cases makes against the general rule that the jurisdiction of the court of another state is presumed in the first instance, but is open to inquiry. In *Lapham v. Briggs*, 27 Vt. 34, and in *Price v. Hickok*, 39 Vt. 292, the objection was raised by plea. In *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132, over of the record having been obtained, and it being apparent that the supreme court of New York, which rendered the decree for alimony, had not jurisdiction of the person of the defendant, a demurrer was sustained.

462 The remarks of the court in *Price v. Hickok*, 39 Vt. 292, in substance, that a judgment of the court of another state rendered without notice to the defendant could not be enforced by action out of the state where it was rendered; that one state or nation has no right to thus give extraterritorial effect to its laws and judicial proceedings and require another state to enforce them by action, are not opposed to the rule of pleading that such want of notice cannot be raised by demurrer when, as in this case, it does not appear by the record that the court that rendered the judgment had not jurisdiction of the defendant.

The pro forma judgment is reversed, demurrer overruled, declaration adjudged sufficient and cause remanded.

FOREIGN JUDGMENTS—ACTION ON—PLEADING—JURISDICTION—PRESUMPTION.—In an action upon a foreign judgment, the plaintiff need not specifically allege that the foreign court had jurisdiction of the action, of the parties, or of the subject matter: *Fisher v. Fielding*, 67 Conn. 91, 52 Am. St. Rep. 270. A judgment of a foreign court, complete and regular on its face, is prima facie valid: Note to *Fisher v. Fielding*, 52 Am. St. Rep. 281. The question of jurisdiction, either of the person or the subject matter, is open to inquiry: *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794; but the judgment can be impeached only by proof of fraud or want of jurisdiction: Note to *Fisher v. Fielding*, 52 Am. St. Rep. 281.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

MILLER v. WHITE.

[46 WEST VIRGINIA, 67.]

ATTACHMENT — AFFIDAVIT — LIEN.—A second affidavit and attachment on a different ground may be had in the same suit; but the second attachment does not, as a lien, relate to the first, and is a lien only from its levy as to personalty, or its date as to land.

ATTACHMENT—AFFIDAVIT—JURISDICTION.—A total absence of any affidavit in attachment fails to confer jurisdiction, but a mere insufficient averment in such affidavit, rendering it defective and voidable, does not make the proceeding void or without jurisdiction.

ATTACHMENT—AFFIDAVIT AS PART OF RECORD.—Whenever the validity of an attachment is involved, or the jurisdiction questioned, the affidavit for, and the order of, attachment are parts of the record.

ATTACHMENT — INTERVENOR — PLEADING.—Any person interested in the property may intervene and dispute the validity of an attachment, or state a claim to, or interest in, or lien on, the property under attachment. He may challenge the validity of the attachment by plea in abatement.

APPEALS—HARMLESS ERROR.—If the court, and not the jury, should pass on a matter and find thereon, but the jury finds upon it, and such finding is not prejudicial error, and the court renders the same judgment upon such finding that it should have rendered if the finding had been left to it alone, the error is harmless, and not ground for reversal.

ATTACHMENT—FRAUD AS GROUND FOR.—If a person buys property with positive intention not to pay for it, this is a fraudulent purchase, whether he makes false representations or not, and gives the vendor ground for attachment.

ATTACHMENT — INSOLVENCY — FRAUD. — A purchaser's knowledge that he is insolvent, and that his ability to pay is doubtful, does not alone, without positive intent not to pay, make the purchase fraudulent; but if, knowing his insolvency, he makes

a statement that he is solvent to obtain credit, the purchase is fraudulent, and constitutes a ground for an attachment by the vendor.

SALES—FRAUD IN.—The intention of a purchaser not to pay for property may be inferred by the jury from the circumstances, and the conduct of the vendee, not only in respect to the sale in question, but in other contemporaneous transactions.

VERDICT—SETTING ASIDE.—A verdict palpably contrary to the great preponderance of the evidence and contrary to law on the established facts must be set aside.

V. B. Archer and W. N. Miller, for the plaintiff in error.

J. E. Beller, C. E. Hogg, and W. R. Gunn, for the defendant in error.

69 BRANNON, J. This is a contest between two creditors of a common debtor under attachments on the same property. Miller brought assumpsit in the circuit court of Mason county against White, and levied an attachment upon certain personal property; and later Carney brought a chancery suit in same court against White, and levied an attachment on the same property, and some days later filed another affidavit, and sued out and levied on the property another attachment, and then filed a petition in the Miller action, under the code of 1891, chapter 106, section 23, disputing the validity of Miller's attachment, and setting up his own second attachment as a superior claim to Miller's attachment; and he filed a plea in abatement, denying the ground stated by Miller in his affidavit for attachment, namely, that White fraudulently contracted the debt on which Miller's attachment was based. The property was sold, under order of the court, as perishable, and the fund awaits decision of this litigation. A jury tried the case, and found that Carney's second attachment lien was superior to Miller's attachment lien, and that the grounds stated in Miller's affidavit for his attachment did not exist, and the court gave judgment of preference for Carney, and Miller appeals by writ of error.

Miller claims that Carney's attachment is invalid, and does not affect his attachment. Carney's first affidavit is bad. It is not relied on by counsel, nor is the attachment under it. Carney's second affidavit is attacked because it does not state who is the payee of a draft and negotiable notes given by White, and does not say that plaintiff is entitled to them as holder. It gives dates, amounts, and maturity of the draft and notes, and says that White made them. It does not say

to whom executed, but it states that they were given for logs sold by Carney to White, and this justifies the conclusion that Carney was payee in the draft and notes, and owned them; and this denies the application to this case of *Sommers v. Allen*, 44 W. Va. 120. ⁷⁰ I hardly think the omission to state the bank of payment would defeat the affidavit.

It is contended that there can be no second attachment in the same suit. The code allows several orders of attachment, to go to different officers, to be issued at the same or different times, but I understand this to mean several orders of attachment on one affidavit for the same ground or grounds of attachment; and so this clause does not justify a second affidavit on a different ground of attachment, and a second attachment on that ground. Nor does that clause of the statute allowing an amended affidavit to show additional facts to sustain a ground of attachment before stated in an affidavit. But the code says that "the plaintiff, at the commencement of the action or suit, or at any time thereafter before judgment, may have an order of attachment" on filing an affidavit stating that "some one or more of the following grounds exist for such attachment" (naming eight grounds). Now, assume a suit properly in court, and an attachment on one ground, and the plaintiff later discovers another ground. Why shall he not sue out a second attachment upon a second affidavit, stating the second ground of attachment? In this case Carney alleged grounds of attachment other than that of nonresidence in his first affidavit, and seeing that it was bad, and discovering that White was, or had since become, a nonresident, why not say that the code intends to allow him the benefit of nonresidence for attachment? See *Crim v. Harmon*, 38 W. Va. 603. Such second attachment does not, for lien, relate back to the first, but is a lien only from its levy as to personalty, or its date as to land.

Another question: I have no idea that, if there is no jurisdiction for the suit at its start, a second attachment can impart jurisdiction. Jurisdiction, at the start of Carney's suit, rested on the charge that White had absconded and concealed himself from process, and that the debt was fraudulently contracted; and it being a suit in equity on a legal demand, jurisdiction rested solely on the attachment; and, as the first affidavit was bad, the question arises whether there was jurisdiction—that is, whether the bad affidavit gave the court jurisdiction, so

as to warrant a second attachment. For such a question we must distinguish ⁷¹ between void and voidable. The first affidavit, though defective, was only voidable or quashable, not a total nullity; and the attachment gave jurisdiction, notwithstanding the defect in the affidavit: *Van Fleet on Collateral Attack*, sec. 257; *Cooper v. Reynolds*, 10 Wall. 308. Mere error in proceedings does not destroy jurisdiction, if the court has jurisdiction in cases of that class: *Drake on Attachments*, sec. 89. Attachment proceedings are not void because an affidavit fails to say that the claim is "just": *Ludlow v. Ramsey*, 11 Wall. 581. That is the defect in the first affidavit in *Carney's* case. A total absence of affidavit would render the suit one without jurisdiction, but a mere insufficient averment in an affidavit would not make the proceeding void, as one without jurisdiction: 1 *Shinn on Attachments*, secs. 152, 411, note 3; *Drake on Attachments*, sec. 87a. It is said that the second attachment is without affidavit to support it, unless it be the first or bad one, as the second affidavit is a fugitive paper, not part of the record, because neither it nor its attachment is mentioned in the bill. The affidavit bears the title of the suit, and expressly says that *Carney* had brought the suit, and that it was then pending. It is a part of the record, though not mentioned in the bill. An attachment is an ancillary proceeding, but is a part of the record; and this one refers to an affidavit, and it and the affidavit bear the same date, and we must connect them. Wherever the validity of an attachment is involved, or the jurisdiction questioned, the affidavit is part of the record: *Drake on Attachments*, sec. 90. It is clear that as *Carney* set up a lien against the property by his attachment, though a stranger to the suit, he not only had a right to contest the validity of *Miller's* attachment, but also, by plea in abatement, to deny the ground on which it stood, and to disprove the facts to show such ground, as the code allows any person to intervene and dispute the validity of an attachment, or state a claim to, interest in, or lien on the property, under any other attachment or otherwise; in other words, to challenge the validity of the attachment, just as the defendant might do: *Ludington v. Hull*, 4 W. Va. 130; *Capehart v. Dowery*, 10 W. Va. 130. Therefore, it was no error to allow the plea in abatement: *Stevens v. Brown*, 20 W. Va. 450. The party thus intervening must be, not a general ⁷² creditor by note or other demand, without lien, but must be one who has

a claim to, an interest in, or lien on the property by other attachment or otherwise. So reads the statute: 1 Shinn on Attachments, secs. 411, 427; *Crim v. Harmon*, 38 W. Va. 596. Of course, as this stranger is allowed to intervene and make defense to the attachment, the correlative right is given the plaintiff to contest this stranger's right by showing invalidity of his attachment, for patent defect or want of ground of attachment. That would be only a right of defense, when attacked.

Another question: It was proper for the court to pass on the legal effect of Carney's attachment papers, to determine whether Carney had a valid lien; but had the jury anything to do with them? Carney asked to contest the validity of Miller's attachment, and he made a motion to quash it, which was overruled, and then filed a plea in abatement to Miller's attachment, denying the right of attachment, to which Miller replied generally, and issue was joined under that plea. No other issue of fact was in the case. The jury was sworn to try "the issues joined, and inquire into the petitioner's claim," and rendered a verdict that Carney, by his second attachment, had a lien prior to Miller, and that the grounds of attachment stated in Miller's affidavit did not exist. This feature of the case presents perplexing questions. There was nothing proper to go to the jury but the issue on the plea of abatement. The jury, however, was sworn to inquire into Carney's claim. It is true the code does say that a jury shall inquire into the claim of the party claiming right over the plaintiff; but that means where an issue of fact is developed, and does not mean that where, as in this case, the contestant's claim is based on the legal effect of documents, a jury is to pass on that. Therefore it was wrong to swear the jury to try anything but the issue on the plea in abatement, and wrong to put before it the attachment and affidavit, and especially the bad affidavit and attachment. Of this I feel sure. But I do not feel so sure of the effect of this error. Does it prejudice, or is it harmless? I conclude that swearing the jury to pass on Carney's claim is simply surplusage, so to call it, immaterial; and so with the introduction as evidence of the attachment ⁷³ papers. It may be said that this improper inquiry and evidence may have injured Miller by tending to confuse the jury as to the true issue under the plea in abatement, but I hardly think so. Improper evidence, if it might have injured the party, will reverse a verdict; but as the issue under the plea and the further inquiry

as to Carney's claim were distinct and separate, I do not see that such evidence could have reasonably influenced the jury as to the matter before it on the plea.

From what I have said it follows that the court, not the jury, should have found for or against Carney's lien. The court has not done so, except inferentially, by rendering judgment on the verdict. Is this reversible error? I think not. We find, on the papers, Carney's lien good; and the circuit court, having, by overruling the motion for a new trial and rendering judgment, done what it should have done, had it properly passed on Carney's lien, we conclude that this omission to find as to Carney's lien is not reversible error.

Contention is made that Miller cannot question the effect of Carney's attachment documents, as he did not incorporate them in a bill of exceptions; but their legal effect would arise on a motion for new trial.

Miller excepts because he was refused an instruction that every person is presumed to anticipate and intend the probable consequences of known causes and conditions; hence, if White, who purchased logs of Miller, was insolvent (that is, did not have money to make good his promises of payments), and White knew of his insolvency and inability to pay, then his intention not to pay should be presumed; and if, when he purchased logs from Miller, he had no means by which he could meet the cash and other payments which he proposed and agreed to make, he was guilty of perpetrating fraud on Miller, and thereby fraudulently contracted the debt, and the jury should find for Miller. This involved the law question of what is a fraudulent contraction of debt under our statute making that a ground of attachment. This question is touched, but not decided, in *Wickham v. Martin*, 13 Gratt. 436. The law is that, where one buys property with intention not to pay for it, it is a fraudulent purchase, whether he makes false ⁷⁴ representations or not. A purchaser's mere knowledge that he is insolvent, and that his ability to pay is, to say the least, doubtful, will not, alone, unattended with a positive intent not to pay, make the purchase fraudulent. True, the difference between buying without reasonable expectation or ground for expectation of paying, and buying with fixed intention of not paying, is not very plain. One who buys, with no present means, and with no reasonable ground to believe that he can raise a considerable sum to pay with, seems to contemplate, as a reasonable man, that he will not be able to pay. He would

expect that as a natural result. Still, there must be an intention not to pay, and whether there is a jury must say, under all the circumstances. Such intent "may be inferred by the jury from the circumstances and conduct of the vendee, not only in respect to the sale in question, but in other contemporaneous transactions": *Hennequin v. Naylor*, 24 N. Y. 139; 21 Am. & Eng. Ency. of Law, 50; Benjamin on Sales, 442. *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501, holds that: "A contract for the purchase of goods on credit, with intent on the part of the purchaser not to pay for them, is fraudulent; and, if he has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where he intends to pay, and has reasonable expectation of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent, and does not disclose it to the vendor, who is ignorant of the fact." If, in addition to insolvency, the purchaser makes misstatements of his ability to pay, or means of payment, there is fraud. "Here the rule is this: If he fraudulently misstates the facts—material facts—the sale is voidable. False statements as to what property he owns, what debts he owes, what amount of business he is doing, that his property is unencumbered, etc., come within this class": Benjamin on Sales, 441. "One who, knowing the insolvent character of his business, makes a statement that he is solvent, and does this to obtain credit, fraudulently contracts a debt, within the meaning of the statute. But the bare fact of insolvency at the time a debt was contracted does not make it fraudulent. It must be incurred with intent to defraud the creditor": 1 Shinn on Attachments, 75 sec. 125. Tried by these principles, I do not think it was error to reject that instruction, as it told the jury that mere insolvency and inability to pay, known to White, would raise a presumption of an intent not to pay, and infallibly make the contract fraudulent on his part.

The last question is whether the verdict, finding that the purchase was not fraudulent on White's part, is to stand. White came to Mason county from Indiana, where he resided, in June, 1896, stayed over night at a hotel, and could not pay his bill of seventy-five cents. He himself says that when he arrived he "may not have had a dollar." That month he purchased a mill at five thousand two hundred dollars, agreeing to pay one thousand dollars down, the balance later; but, though put in possession, he paid nothing. He expected

money from parties, as he says, but was disappointed. That month he borrowed little amounts from Kisar. After he purchased the timber, he bid on building a boat for five thousand six hundred dollars, on which there would be a loss of eight hundred dollars; and yet this is a source from which he hoped to pay for the timber. He boarded with Mrs. Loomis, paying only a part of the board, and left the state in July in debt to her for board, and to her husband for work. He told this lady that he had money in a safe in Indiana, and had written to his daughter to send it, but she could not open the safe, and he would write to her to break it and send the money. The money did not appear. In June he offered to buy of Miller fifteen thousand dollars' worth of timber, without a dollar to pay for it, and did buy a lot of timber, coming to three thousand seven hundred and thirteen dollars and forty-three cents, and agreed to pay one thousand dollars cash, balance in thirty and sixty days, but paid nothing. He promised to send Miller a check for one thousand dollars, but failed. Oral evidence and his letters show this. He then wrote Miller to draw a sight draft for it, which he did, but it was not paid. He then wanted Miller to take a time note for it. He had no money in bank at Point Pleasant, where he carried on milling, or elsewhere, to pay a check or draft. When negotiating with Miller, he told Miller that he had one thousand dollars to pay cash, but wanted time for the balance. He ⁷⁶ admitted as a witness that he did not have one thousand dollars, or any money, but expected to get money. He represented to Miller that he had carried on extensive milling in Indiana, had sold out, and would get money from there. He promised Miller cash, then a check, then to pay a draft, and then sought to get further time; and we may fairly say that this "putting off" was to get possession of the timber, as he did, it being sent to him from Parkersburg. White's letter requesting Miller to accept his note at thirty days and take up the draft is irrefutable evidence that he had no money, as many other circumstances show. In fact, he so admitted on the witness stand. In a letter he said he expected to get money from building a boat, which he never built, and again he says he expected money from a sale of the timber. If he had told Miller that he had no money, but mere expectation of it, would Miller have sold the timber to him? He suppressed his insolvency and asserted solvency. To induce Miller to sell, he told him that he had bought timber of Carney. So he had, to the amount of nine-

teen hundred and five dollars, and gave Carney an accepted draft, June 24th, for down payment six hundred and thirty-five dollars, and two time notes, and never paid a cent. Carney's affidavit charged White with fraud in that purchase from him, and with false representation that he had money due him from some one in Indiana, and would get it in a few days. This purchase was shortly before that of Miller. The same circumstances give hue to both. I am at a loss to see how Carney can say that White fraudulently contracted the debt to him, and turn around and say that no fraud exists in the Miller transaction. Miller swore to these statements and representations of White, and White, though on the stand afterward, did not deny Miller's evidence. White's own evidence shows that he had no means, but a mere hope of getting money, with no basis shown on which to found that hope—a mere hope to sell the timber. That he made the statement that he had money to pay the down one thousand dollars is sworn to by Miller, not contradicted, and is verified by the fact that he agreed to pay the cash, and then promised a check, which a letter to Miller shows, and then authorized a sight ⁷⁷ draft. This alone is a representation of having the money. This shows that he held out to Miller that he had money to pay the one thousand dollars, even if Miller's evidence, uncontradicted, were not in the case. He admits he did not tell Miller that he merely relied on some deal to get the money. He expected to sell the timber. He admits he had no money in bank to pay check or draft. And I see just now that he admits that he told Miller he had sold property in Indiana, from which he expected to get money to pay him; and he admits that this was untrue, as he says his son in law owned a farm, and he expected him to sell, and come to this state to live. He had no interest in the farm, further than he had lent his daughter seventy-five dollars or one hundred dollars. He admits he had only one hundred and twenty dollars in that safe in Indiana. Did he have that? It never appeared. Here we find a man, coming to this state, making large purchases of mills and timber within a few weeks, amounting to ten thousand dollars, agreeing to pay cash part payment, paying not a cent, purchasing on false statement of having means to pay, ready money to pay the cash installments, and yet without property or money—utterly so; so poor that he had to borrow money from others to pay his day laborers, and money to go the short trip to Parkersburg to buy Miller's timber, and

without money to pay hotel or board bill. These facts are admitted by White on the stand as a witness, and proven clearly by uncontradicted testimony. Slow as I am to overthrow verdicts, I must say that this verdict is utterly indefensible, because plainly, palpably contrary to the very great preponderance of the evidence. Indeed, the facts being shown even by White's own evidence, the verdict is contrary to law on those facts. And therefore I may say we do not have to perform the delicate function of setting aside a verdict as contrary to evidence, for courts always set aside verdicts that are contrary to law on admitted facts. On these facts, the jury departed from the instructions given by the court. For some reason or other, the jury seems to have become confused in the mazes of the case, or mistaken the law. Even under the syllabus in *Young v. West Virginia etc. R. R. Co.*, 44 W. Va. 218, that "the verdict of a jury will be held sacred ⁷⁸ unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or misconception of the facts or law," we would have to overrule this verdict on the plea in abatement. The evidence on Miller's side is credible—virtually uncontradicted; the facts are shown by White's evidence; and the verdict is contrary to law. Judgment reversed, verdict set aside, new trial awarded, and remanded.

Judgments Depending for Their Validity on an Attachment of Property.*

The object of this note is to show what defects in proceedings by attachment are of so serious a character as to render void a judgment, where summons has not been personally served within the state, and jurisdiction is therefore dependent upon the attachment alone. In proceedings of this nature where the court exercises an extraordinary power under special statutory provisions prescribing its course, that course must be strictly pursued, and the facts which give jurisdiction must appear on the face of the record. Otherwise the proceedings are not merely voidable, but absolutely void, as being *coram non iudice*: *Thatcher v. Powell*, 6 Wheat. 119; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *Sherwood v. Reade*, 7 Hill, 431; *Haywood v. Collins*, 60 Ill. 328; *Eads v. Pitkin*, 3 G. Greene, 77. It is a good defense to a judgment that it was obtained by attachment of property without service of process person-

*REFERENCE TO MONOGRAPHIC NOTE.

Attachment—Irregularities and defects for which may be avoided: 79 Am. Dec. 164-174.

ally on the defendant and without appearance by him and that it was void in the state in which it was recovered, for failure to comply with the prerequisites of the attachment law: *Earthman v. Jones*, 2 Yerg. 483; *Walker v. Cottrell*, 6 Baxt. 257.

In proceedings by attachment against nonresidents, the affidavit is the foundation of the jurisdiction of the court. It must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ; and its entire omission or the omission of any essential fact therefrom renders all the proceedings coram non judge. Thus, where the affidavit to authorize the issue of an order of attachment must be made by the plaintiff, his agent, or attorney, such issue without such an affidavit, and the levy of the writ on real estate, the service of summons by publication, and judgment rendered by default are without jurisdiction and void; and the entire proceedings may be set aside on motion: *Manley v. Headley*, 10 Kan. 88; *Kerr v. Smith*, 6 B. Mon. 552; *Stewart v. Mitchell*, 10 Heisk. 488; *Calk v. Chiles*, 9 Dana, 265; *Hargadine v. Van Horn*, 72 Mo. 370; *Burnett v. McClury*, 78 Mo. 676.

The validity of a judgment depends upon the facts stated in the affidavit, and, when they are insufficient and not in compliance with the statute, the judgment is void: *Capehart v. Dowery*, 10 W. Va. 130; *McGown v. Sprange*, 23 Ala. 524; *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768. The affidavit is the foundation of the proceedings by attachment, and becomes part of the record. It is not subject to be aided or attacked by parol: *Watt v. Carnes*, 4 Heisk. 532; *Maples v. Tunis*, 11 Humph. 108, 53 Am. Dec. 779; *Shivers v. Wilson*, 5 Har. & J. 130, 9 Am. Dec. 497; *Goss v. Board of Commrs.*, 4 Colo. 468. If the nonresidence of the defendant is not set out and sworn to clearly in the affidavit, the attachment and judgment are illegal and void: *De Leon v. Heller*, 77 Ga. 740.

In a proceeding by attachment against a debtor who is a non-resident of the state, the affidavit must show either that the creditor resides out of the state, or that the debt arose upon a contract made within the state. Otherwise the court does not acquire jurisdiction to grant the attachment: *Staples v. Fairchild*, 3 N. Y. 41. The statute must be pursued strictly, or the attachment and all of the proceedings under it are void. If the affidavit for the attachment does not contain the statement of facts specified by the statute, a sale of land under a judgment recovered upon the attachment is void and passes no title: *Conrad v. McGee*, 9 Yerg. 428; *Ex parte Haynes*, 18 Wend. 611. Where the record of a judgment in attachment shows that the preliminary affidavit was sworn to before an officer not authorized to administer oaths, the judgment and sale under it against a nonresident defendant are void for want of jurisdiction: *Greenvault v. Farmers' etc. Bank*, 2 Doug. (Mich.) 498. If the affidavit attached to the petition in an

attachment proceeding, merely states, to the best of the information and belief of the affiant, that the defendant is a nonresident of the state, the court obtains no jurisdiction over the land attached and the judgment and sheriff's deed thereunder are void: *Bray v. McClury*, 55 Mo. 128. If the affidavit fails to state that the defendant is a nonresident, or to give his residence, it is fatally defective and will not support the judgment: *Cantrell v. Letwinger*, 44 Miss. 437. But, if the affidavit is regular, made in good faith, and states the belief of the plaintiff that the defendant is a nonresident, it is sufficient to support the judgment, and the court cannot collaterally inquire into the fact of nonresidence, and declare the proceedings void: *Weber v. Weitling*, 18 N. J. Eq. 441. If the affidavit states that the "defendant is a foreign corporation or a nonresident of the county," it is fatally defective, as being in the disjunctive, and judgment rendered thereunder is void: *Dickenson v. Cowley*, 15 Kan. 269. An attachment based upon a paper having the form of an affidavit, except that it does not appear, either upon its face nor by extrinsic evidence, to have been sworn to by any officer is absolutely void, and a judgment based thereon, in a case where there is no personal service of summons, is equally void: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 40 Am. St. Rep. 907. An affidavit for an attachment, stating that the defendant is not a resident of the state, or has departed therefrom, without stating that such departure was with intent to defraud his creditors or to avoid the service of summons, is insufficient to confer jurisdiction upon the court, and, in the absence of personal service of summons, all proceedings thereunder are void: *Birchall v. Griggs*, 4 N. Dak. 305, 50 Am. St. Rep. 654. In such a case, the affidavit must set out the very words of the statute or it is fatally defective: *Severn v. Giese*, 6 N. Dak. 523. Jurisdiction of a defendant cannot be acquired by proceedings in attachment on the ground of his nonresidence in the state, when the affidavit fails to show, as required by statute, that the action is one arising upon contract, judgment, or decree: *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 481. It is a fatal error for the plaintiff in an attachment in which there is no other jurisdiction obtained in the case than that by levying the writ and publishing the notice to take judgment for more than the sum claimed in the affidavit, with subsequently accruing interest: *Rowley v. Berrian*, 12 Ill. 198; *Hobson v. Emporium etc. Co.*, 42 Ill. 306; *Forsyth v. Warren*, 62 Ill. 68; *Henrie v. Sweasey*, 5 Blackf. 273. An affidavit in attachment stating the names of the parties, the amount of the indebtedness, that defendant has concealed himself to avoid the service of process, and that his whereabouts are unknown, though defective in failing to state the nature of the indebtedness, the defendant's place of residence, or that such place is unknown, or cannot upon diligent inquiry be ascertained, is voidable but not void; and is sufficient to give the court jurisdiction of the subject matter. Its judgment is merely

voidable, and not open to collateral attack: *Hogue v. Corbit*, 156 Ill. 540, 47 Am. St. Rep. 232.

In an early case in North Carolina it was held that under the law of that state a judgment in attachment had the same effect as if process were personally served, and that such judgment was not in rem, but personal. Hence, defects in the affidavit did not render the judgment void: *Skinner v. Moore*, 2 Dev. & B. 138, 30 Am. Dec. 155. Of course, this decision is contrary to the universal rule now obtaining that a judgment in attachment, without personal service on the defendant, is in rem alone.

An affidavit for an attachment against a nonresident of the state need not state that the payment of the claim is not secured, and that the claim is upon a contract. The latter fact need appear only from the complaint: *Kohler v. Agassiz*, 99 Cal. 9.

If, on attachment against a nonresident debtor, the plaintiff, after obtaining judgment by default on proof of publication, fails to give the bond required by statute before issuing execution against a garnishee, or sale thereunder, the sale is utterly void and passes no title to the purchaser: *Hiller v. Lamkin*, 54 Miss. 14.

Many cases hold that publication of summons as notice to a nonresident or absent defendant is essential to the jurisdiction of the court in attachment cases conducted without personal service of summons. They accordingly hold that if such publication is not made in strict accordance with the statute, or is substantially defective, there is no jurisdiction and the judgment is void. It is everywhere conceded in such cases that the levy of the attachment must precede the publication of notice, but when such publication does not conform to the statute it gives the court no jurisdiction of a judicial attachment, and judgment founded thereon is void. A notice by publication is fatally defective which fails to show that the attachment has been issued, or that it has been levied, or the cause for which it has been levied: *Riley v. Nichols*, 1 Heisk. 16; *Drake v. Hale*, 38 Mo. 346. An affidavit stating merely that the defendant in attachment is a nonresident of the state, but not stating that he has property within the state, is not sufficient to justify service by publication, which is necessary to confer jurisdiction on the court: *Spiers v. Halstead*, 71 N. C. 209.

In deciding a question of jurisdiction in attachment in Illinois, it appeared that a writ of attachment was sued out against a nonresident, sent to another county, levied upon lands, but returned not found as to the defendant, a judgment was rendered at the return term against him, but the court did not find that there was notice, either actual or constructive, and there was no personal service, and the notice of publication filed did not purport to be signed by the publisher or printer of a newspaper. The supreme court, on appeal, held that the notice was fatally defective, that the court thereby acquired no jurisdiction of the person of

the defendant, and that the judgment was void: *Haywood v. Collins*, 60 Ill. 328. And in another case it was held that an affidavit filed, a bond given, an attachment issued and levied, publication made, and proof thereof, were necessary to confer jurisdiction upon the court: *Gibbons v. Bressler*, 60 Ill. 110. In Michigan, it is held that judgment by default in a suit by attachment in which there has been no actual service or appearance cannot be taken until the plaintiff has strictly complied with all precedent conditions imposed by statute. Hence when he has failed to publish notice of the proceedings within thirty days after the return day of the writ, as required by the statute, on failure to make personal service on the defendant, the court loses jurisdiction to proceed further, and the publication of notice thereafter is ineffectual to preserve the lien of the attachment or render the judgment valid: *Millar v. Babcock*, 29 Mich. 526; *Brown v. Williams*, 39 Mich. 755; *Woolkins v. Haid*, 49 Mich. 299. *Taylor v. Troncoso*, 76 N. Y. 599, is to the same effect. An attachment and judgment are void in New York if there is failure to serve the summons personally, or by publication, as required by statute: *Blossom v. Estes*, 84 N. Y. 614; *Mojarietta v. Saenz*, 58 How. Pr. 505; *Donnell v. Williams*, 21 Hun, 216; *Kelly v. Countryman*, 15 Hun, 97. The object of the publication of the notice is to obtain jurisdiction of the person of the defendant, and, if such published notice is defective and the statute is not strictly pursued, the judgment is void: *McMinn v. Whelan*, 27 Cal. 300. If the record in an attachment case shows that the defendant was a nonresident, that judgment by default was taken against him without personal service or notice of the proceedings against him, and without personal service on his part, the judgment is *coram non judice* and void: *Clark v. Bryan*, 16 Md. 171. So in *Bailey v. Beadles*, 7 Bush, 383, it was held that jurisdiction does not depend upon the affidavit, but upon the service of summons, actual or constructive. And in Tennessee, the publication of notice in attachment is regarded as an essential element of jurisdiction: *Earthman v. Jones*, 2 Yerg. 484; *Walker v. Cottrell*, 6 Baxt. 257. If an attachment is levied upon the real estate of a nonresident, and service of summons is not made upon him, the court possesses no power to render judgment against him and order a sale of his property, unless publication has been made as required by law, and such notice should contain a description of the property attached: *Wescott v. Archer*, 12 Neb. 345; *Edwards v. Toomer*, 14 Smedes & M. 75.

The fact of publication of notice as required by statute must appear from the records of the court: *Foyles v. Kelso*, 1 Blackf. 215; *Edwards v. Toomer*, 14 Smedes & M. 75. Thus, in cases where the defendant does not appear, the record must show a legal service or the judgment is void, and the rule is the same whether the service relied upon is personal or constructive: *Repine v. Mc-*

Pherson, 2 Kan. 340; Ferguson v. Gilbert, 17 S. C. 26. A judgment in an attachment suit is void if it was rendered on constructive service and the complaint was not on file at the time of the issue of the order of publication: Anderson v. Coburn, 27 Wis. 558.

There are a number of cases, however, which hold that the seizure of the property of the defendant under attachment is the foundation of the court's jurisdiction and that defective or irregular affidavits and publications of notice, though they may be grounds for the direct reversal of the judgment, for error in departing from the directions of the statute, do not render such judgment or the subsequent proceedings void, nor subject to collateral attack. Perhaps the leading case maintaining this doctrine is that of Cooper v. Reynolds, 10 Wall. 308; and it has either been followed or its principles applied in a number of cases, among which may be cited Pennoyer v. Neff, 95 U. S. 714; Bank v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664; Hardin v. Lee, 51 Mo. 241; Freeman v. Thompson, 53 Mo. 183; Holland v. Adair, 55 Mo. 40; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Beech v. Abbott, 6 Vt. 586; Gilman v. Thompson, 11 Vt. 643, 34 Am. Dec. 714; Crowell v. Johnson, 2 Neb. 146; Gregg v. Thompson, 17 Iowa, 107; Shawhan v. Loffer, 24 Iowa, 217. These cases maintain that the court obtains jurisdiction by the levy of the writ of attachment, and that the absence of proof of service or publication of notice can be taken advantage of only by the defendant in a direct proceeding, and that the validity of such attachment cannot be inquired into in a collateral proceeding where the title to the property sold under execution is brought into question. Thus, the court acquires jurisdiction in attachment by the issuing of process predicated upon the requisite affidavit, and the attaching of the property, and if, after obtaining jurisdiction in such manner, the court proceeds to render judgment without the publication of notice or upon a defective publication of notice, such judgment is not void, and cannot be impeached collaterally, but must be reversed by writ of error on appeal: Paine v. Mooreland, 15 Ohio, 436, 45 Am. Dec. 585; Kane v. McCown, 55 Mo. 181; Johnson v. Gage, 57 Mo. 160.

GUINN v. OHIO RIVER RAILROAD COMPANY.

[46 WEST VIRGINIA, 151.]

EMINENT DOMAIN—DAMAGES—RAILROADS.—Though a railroad company has legal authority to build a railroad in a street, yet, if so doing works injury to an abutting property owner, he may recover damages of the company therefor.

NUISANCE—DAMAGES.—If a private nuisance is of such character that its continuance is necessarily an injury, and it is of a permanent character, that will continue without change from any cause but human labor, and dependent for change on no contingency of which the law can take notice, then the damages are original, and a right of action at once exists to recover the entire damage, past and future, and one recovery bars a second recovery for the continuance of the nuisance. Otherwise, when the damage is not continuous, but intermittent, occasional, or recurring.

EMINENT DOMAIN—DAMAGES TO LOT ABUTTING ON RAILROAD, LIABILITY OF LESSEE.—If a railway company builds its road in a street and thus damages an abutting lot, the damage is original and permanent, and such company is at once liable therefor, but a lessee company subsequently operating the road is not liable for such damage.

EMINENT DOMAIN—DAMAGES TO LOT ABUTTING ON RAILROAD.—If a railway builds its road in a street, under license, and thereby damages an abutting lot, the measure of damage is the difference in the value of the lot immediately before and immediately after the construction of the road.

EMINENT DOMAIN—MEASURE OF DAMAGES TO ABUTTING PROPERTY.—In estimating damages to a lot and mill thereon from the construction of a railroad in front of it, the increased wholesale trade resulting therefrom may be set off against the loss of local retail trade, in fixing the value of the property.

Vinson & Thompson, for the plaintiff in error.

Campbell, Holt & Campbell and G. I. Neal, for the defendants in error.

¹⁵² BRANNON, J. This action of trespass on the case was brought by Guinn Brothers against the Ohio River Railroad Company to recover damages for injury to a lot of land, and a mill standing upon it, consequent upon the construction and operation of the Big Sandy Railroad along Second avenue, ¹⁵³ in the city of Huntington, in front of said property. The jury found for the plaintiffs four thousand five hundred dollars, for which judgment was rendered, and the defendant appeals.

It is well settled in this state that though a railroad company has legal authority to build a railroad in a street, yet, if the same work injury to an abutting property owner, he may

recover of the company damages therefor: *Stewart v. Ohio etc. R. R. Co.*, 38 W. Va. 438. The case at once presents a troublesome question: Is the Ohio River Railroad Company liable at all? The railroad was not built by it, but by another corporation, the Lexington & Big Sandy Railroad Company; but by lease or otherwise, it went into the hands of the Ohio River Railroad Company, which was operating it when this suit was brought against it alone. I need not discuss liability for wrongs of lessor and lessee railroad companies under the different forms of the question often arising. Our question is, Is the Ohio River company liable? If we say that the construction and operation of the road in front of the plaintiff's property is a private nuisance, it might seem, at first thought, that the Ohio River company would be liable, on the legal principle that where a lessor constructs something that is a nuisance and the source of injury, and leases his land, and the tenant actively continues the nuisance, both are liable, and, I suppose, either. In such case the lessor originates, and the tenant continues, the wrong: Taylor on Landlord and Tenant, sec. 175; Wood on Landlord and Tenant, sec. 539; 2 Hilliard on Torts, 587; 1 Jaggard on Torts, 223; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Joyce v. Martin*, 15 R. I. 558. See as to liability of lessors and lessees of railroads, note in *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147. But, on further thought, this does not meet the peculiarity or true nature of this case. The instant the Huntington & Big Sandy company finished, and began the operation of, this road, the injury to the plaintiff's property was complete, and that injury was not a temporary nuisance, abatable and removable, because the railroad was authorized by the municipal authority to be in the street, and was not a public nuisance, and was thus a permanent structure, affecting permanently the substantial value of the property, ¹⁵⁴ if in fact it injured it; and right of action at once arose to allow Guinn Brothers to sue the Huntington & Big Sandy company, and recover once for all entire damages for all future time, and they could not maintain action after action, from time to time, to recover damages occurring from time to time from the continued use of the railroad: *Watts v. Norfolk etc. R. R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894; *Henry v. Ohio etc. R. R. Co.*, 40 W. Va. 234, 242; *Smith v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 451. Now, when this cause of action was complete, it was alone against the Lexington & Big Sandy Railroad Com-

pany, and the Ohio River Railroad Company was not then liable to it. Its subsequent lease and operation of the road would not make it liable to that action. True, it continued the operation of the cause of the injury; but it did not assume that action, and the injury giving cause of action was already done. A tenant is not liable for a tort done and completed by the landlord before the lease. A lessee railroad company is not liable for a completed tort of its lessor railroad company: 3 Wood on Railroads, 2054; Pittsburgh etc. Ry. Co. v. Kain, 35 Ind. 291. Plainly, if Guinn Brothers had sued the Huntington & Big Sandy company, there would have been a license to use the railroad ever after, and, if the Ohio River company had then leased it, it would not be liable for continued operation; and, as all it is guilty of is continued operation, I do not see that the fact that suit was not brought against the Huntington & Big Sandy company would make the Ohio River company liable, considering that suit could have been brought, as the right of action was perfect. The construction of the road is the wrong of which the plaintiffs complain, and the right of action and limitation upon it began from construction. It is different where the injury and action do not flow from construction, but from some after-consequence of it, working injury intermittently and occasionally, recurring at times from negligent construction, as in Henry v. Ohio etc. R. R. Co., 40 W. Va. 234, or Dickson v. Chicago etc. R. R. Co., 71 Mo. 575, for diverting a stream by an embankment made in constructing a railroad, and flooding crops from year to year. In that case the opinion seems to concede that where the damage is not occasional and recurrent, but original and ¹⁵⁵ permanent, the lessee would not be liable for continuing the use of the road. In Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, the action was against a city, which changed the course of a stream, but did not do so properly, and in time the land of a party was excavated by the action of the water. It was held to be a permanent and original damage, and that action and limitation began when the change of the stream was made, not when the consequential injury, the subsequent excavation of the soil, took place. The court said: "The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation." The syllabus lays down the true rule: "Whenever a nuisance is of such a character that its continuance is necessarily an injury, and it is of a permanent character, that will continue without change from any cause

but human labor, then the damage is an original damage, and may be at once fully compensated, and the statute of limitations begins to run on an action for damages." If the Ohio River company is liable, when did the statute begin in its favor? Its participation commenced later than the construction. In *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177, a railroad company destroyed a bridge on a highway, and erected a fence upon it, and the town sued; and it was held that the nuisance was permanent and damages for the whole injury may be at once recovered. I cite these cases to show that similar injuries to that in this case have been held original and permanent; but I may rely on our own case of *Smith v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 451, for the same purpose, as it was a case of access to a lot injured by construction of a railroad.

Counsel for defendant insist that this is not a nuisance, seeming to think that, if so regarded, its daily continuance would be a cause of action, and make the company liable. If built in the street without authority, the road would be a public nuisance, and if injuring the plaintiffs, a private nuisance. The town license removed the case of public nuisance, but not that of private nuisance. In this respect it is built as if without authority: *Spencer v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 406, syllabus, point 6. But, even if a nuisance, above cases show that, if the damage is original and permanent, an action for the total recovery, past ¹⁵⁶ and future, at once lies. It is the nature of the injury, not the name we may give the tort, that rules the matter. It is a wrong or tort, name it as we may. I do not see that the name is important: *Wood on Nuisances*, secs. 865, 869. I have found one case seeming to hold otherwise—*Railroad Co. v. Hambleton*, 40 Ohio St. 496—holding the company raising grade of track in the street, and the lessee company afterward operating it, jointly liable to the abutting owner. The raising the grade over the height licensed by the council was treated as an unauthorized act, creating a nuisance, for which both lessor and lessee were liable. There the lessor was a defendant. In this case it is not. It seems to me unreasonable to charge the defendant, the lessee company, with the whole damages to the property. This suit was for permanent injury, and the verdict covers the total damage to the property from the acts of both companies. If the defendant company were liable at all, would it be liable beyond such damages it wrought while operating the road? If

the damages are separable, it ought to pay only such as arose during its use; but it seems to me they are not separable, and that the Big Sandy company is liable, if either is.

There was evidence to show that, owing to the construction of the road, the mill lost some retail trade, but gained in wholesale trade, and that the gain from the latter exceeded the loss from the former. There was opinion evidence pro and con on the question whether the value of the property was as great immediately after as immediately before the construction of the railroad. The property was used solely for mill purposes. The evidence of actual receipts would seem to be a more reliable gauge of value than mere opinion. The verdict of the jury has given me the chief trouble in the case; but, on further consideration, I think the verdict is contrary to the measure or standard of damages set up by law, and it cannot stand. Where a verdict depends upon the weight of evidence and deductions therefrom, or credit of witnesses, it is entitled to great weight, and cannot be set aside, unless very plainly wrong; but where it violates the measure of damages fixed by law, on facts conceded or plainly appearing, it is set aside because ¹⁵⁷ it is contrary to law. Now, the measure of damages is, in such a case as this, fixed by law. If the property, for the purposes for which it is used, is worth as much immediately after as immediately before the construction of the railroad, no recovery can be had. If worth less, the difference between its former and its depreciated value is the measure: *Stewart v. Ohio etc. R. R. Co.*, 38 W. Va. 438; *Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 57 Am. St. Rep. 870; *Board of Education v. Kanawha etc. R. R. Co.*, 44 W. Va. 71; *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837; *Hot Springs R. R. Co. v. Tyler*, 36 Ark. 205 (destroying a millrace in building road without leave). I would incline to think that benefits arising from enhanced facility of transportation, or access to mill, causing additional trade, would be a general, not special, benefit, and not chargeable to the party, as it would not be in condemnation cases (3 Sedgwick on Damages, sec. 1229; Mills on Eminent Domain, sec. 152), as in condemnation you ascertain damages to the residue, not charging general benefits, and in an action for consequential damages you ascertain the same thing—damages to the land. The man specially damaged gets nothing, because the general benefit from the improvement overbalances the injury, and his neighbor not at all damaged is the same. One pays for the other's benefit. I admit, how-

ever, that the law is not such in cases of change of grade of street and actions for consequential injury to abutting property. The plaintiff's own evidence showed that his increased wholesale trade oversized loss in retail trade, and, as the property was used only for milling, I cannot see how, on the whole, there was injury; and I conclude that the verdict, in law, violates the proper standard of damage. Reversed, verdict set aside, new trial granted, and cause remanded.

RAILROADS.—AN ABUTTING OWNER is entitled to recover damages for the construction and use of a steam railway in a street, though it is licensed by the municipal authorities: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639. See, too, the note to *Gainesville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 52.

EMINENT DOMAIN.—THE MEASURE OF COMPENSATION for property injured or taken in constructing a railroad is the difference in value of the land before and after the road is constructed; and in estimating the compensation for taking or interfering with easements, the benefits accruing to abutting property owners by the construction and operation of a railroad along a street must be considered, as well as the damage resulting therefrom: See the extended note to *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 459, 460.

NUISANCE—DAMAGES FOR.—Whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage and may be at once fully compensated: *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792.

RAILROADS.—THE LIABILITY OF LESSOR RAILWAY corporations to persons other than the lessee is the subject of the monographic note to *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147-155.

MILLER v. STATE BOARD OF AGRICULTURE.

[46 WEST VIRGINIA, 192.]

MANDAMUS.—CONTRACT RIGHTS cannot be enforced by mandamus.

MANDAMUS AGAINST STATE CONTRACTS.—Under a constitutional provision prohibiting suits against the state, mandamus does not lie against state officers to compel them to execute an executory contract between an individual and the state, although the state in name is not made a party to the mandamus proceedings.

Flournoy, Price & Smith, for the petitioner.

Watts & Ashby, for the respondent.

192 BRANNON, J. Albert Gallatin Miller entered into a contract, January 2, 1899, with the state, through the commissioners of public printing, to do all the printing for the state for two years, under chapter 16 of the code of 1891. The state board of agriculture, claiming that the printing required in the exercise of its public functions does not fall under that contract, refused to allow Miller to do its printing, and employed the Donnally Publishing Company to do it. Miller therefore asks this court to award him a peremptory mandamus to compel said board of agriculture to have him do its printing. The board moves to quash the mandamus nisi, which motion raises the questions of law on which the case turns. At once we meet the question whether we can compel the board to do what is asked of it. Miller's **193** right grows only out of his contract. Mandamus does not lie to enforce contract rights of a private and personal nature: High on Extraordinary Remedies, sec. 25. But as courts do, by mandamus, compel public officers to perform acts purely ministerial, I suppose, where no other principle prevents, that if a person has a right to have an officer perform such act for his benefit under the law, the fact that it grows out of contract would make no difference. It is claimed that when this contract is once made it is the duty of the departments of government to which it applies simply to execute it, and they have no discretion in the matter, and the duty is simply a ministerial one, commanded by the statute. I shall not enter that wide field of intricate law as to how far the courts can control the administration and functions of the executive department; but, treating the action which we are asked to compel the board to do as purely ministerial, and not discretionary with it, I shall inquire whether this court can compel that action by mandamus. In Chesapeake etc. Ry. Co. v. Miller, 19 W. Va. 408, it is held that, although the state cannot be sued, yet an injunction will lie against the auditor to restrain him from the performance of a mere ministerial duty, and the opinion states that the right to sue a state officer, when the state cannot be sued, either to require or inhibit the performance of a mere ministerial duty has been repeatedly held. That case was to enjoin the auditor from taxing a railroad company in disregard of an exemption claimed by it. It can afford no precedent for this case. This case is the enforcement of a contract against the

state. The general law is that a state cannot be sued without its consent. The constitution, article 6, section 35, provides that "the state of West Virginia shall never be made a defendant in any court of law or equity." The question then arises, Is this suit against the state? It is not, in name, a party, and Chief Justice Marshall once laid down that, in order to say that a suit is against a state, it must be a party to the record in name: *Osborn v. Bank of U. S.*, 9 Wheat. 738, 857. But the supreme court has, as I think properly, overruled that position. The state acts only by officers, and where the action against them is based on no personal interest, but only because officers, and the liability falls, not on them, but the ¹⁹⁴ state, the state is the real party. The federal constitution prohibits a suit in a federal court against a state by a citizen of another state or country, and thus the question has arisen in the supreme court as to when a suit is against a state, and it has been held that whether a state is the actual party defendant in a suit within the meaning of the eleventh amendment is to be determined by a consideration of the nature of the case as presented by the whole record, and not in every case by reference to the nominal parties to the record. In order to secure the manifest purpose of the constitutional exemption guaranteed by the eleventh amendment, it should be interpreted, not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover, not only suits brought against a state by name, but those against its officers, agents, and representatives, where the state, though not named, is the real party against which the relief is asked and judgment will operate. If a bill in equity be brought against the officers and agents of the state, the nominal defendants having no personal interest in the subject matter of the suit, and defending only as representing the state, and the relief prayed for is a decree that the defendants may be ordered to do and perform certain acts, which, when done, will constitute a performance of an alleged contract of the state, it is a suit against the state for the specific performance of the contract within the terms of the eleventh amendment, though the state may not be named as a defendant; and, conversely, a bill for an injunction against such officers and agents, to restrain and enjoin them from acts which they threaten to do, in pursuance of a statute of the state, in its name for its use, and which, if done, would constitute a breach on the part of the state of alleged contract

between it and complainants, is in like manner a suit against the state within the meaning of that amendment, although the state may not be named as a party defendant: *In re Ayers*, 123 U. S. 443. *Hagood v. Southern*, 117 U. S. 52, asserts the same principle. I have recently observed that the case of *Fitts v. McGhee*, 172 U. S. 516, reiterates this doctrine and contains a full discussion ¹⁹⁵ of it. In *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97, mandamus was asked against the executive council to compel it to enter into a contract for printing pursuant to an accepted bid, and to enjoin it from making a contract with another, and it was held that, "though the state is not nominally a party, it is the real defendant, and such an action cannot be maintained against it without its consent." Same principle in *Board of Public Works v. Gannt*, 76 Va. 455. In *People v. Dulaney*, 96 Ill. 503, the commissioners of the penitentiary made a contract with a party to furnish convicts for labor, and the supreme court refused a mandamus to compel the commissioners to furnish them, for the reason, among others, that the constitution, like ours, provided that the state "shall never be made defendant in any court of law or equity, and prohibits this court from enforcing a contract made by the commissioners for convict labor by mandamus, as its effect would be to give an action against the state." "State officers cannot be made respondents in a petition for mandamus, if the effect will be to make the proceeding a suit against the state in a case where the state cannot be sued": 13 Ency. of Pl. & Pr. 654. The board of agriculture is a "department of the state government," in the language of section 11, chapter 33, of the acts of 1895. Its members are state officers. They have no personal interest in this matter. The board and its members are parties only as representing the state. What they may be compelled to do will operate only against the state. Miller simply is enforcing a private contract with the state by compelling one of its agencies to perform it. So far as it lies with that board to perform that contract, it alone can do so; the contract cannot otherwise be performed; and it therefore follows that the suit is purely a suit against the state to enforce its executory contract, and the constitution says it shall not be sued, even if the legislature were to consent. A contract with the state is without legal sanction, as it cannot be enforced by judicial action. The only remedy is appeal to the officers charged with its execution, and, when executed, to the legislature for pay. If the governor, auditor, or superintendent of

schools were to refuse to execute this contract, could we compel them? I think not. Neither could we compel this ¹⁹⁶ board. We cannot compel the state officers to carry out an executory contract. It rests with them. Mandamus refused.

MANDAMUS DOES NOT LIE to compel the performance of private contracts: Florida Cent. etc. R. R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30.

MANDAMUS DOES NOT LIE to compel a municipality to enter into a contract for printing with one who shows himself merely to have been the lowest bidder in a competition to obtain such contract: Note to State v. Rickards, 50 Am. St. Rep. 489. See, too, State v. Rickards, 18 Mont. 145, 50 Am. St. Rep. 476.

HARRIS v. ORR.

[46 WEST VIRGINIA, 261.]

EXECUTORS AND ADMINISTRATORS ARE REQUIRED to exercise only ordinary care and reasonable diligence. An administrator is only required to pursue such course in the management of the intestate's assets as a judicious man, looking alone to his own interests, would, under the circumstances, pursue in his own affairs.

EXECUTORS AND ADMINISTRATORS ARE NOT LIABLE FOR LOSSES to the estate in the absence of willful misconduct or fraud, especially when acting under the advice of counsel, and in no case are they insurers nor liable for an error in judgment.

EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO SUE on a worthless debt, and ordinary care and prudence constitute the true criteria of their duty.

PARENT AND CHILD—CONTRACT FOR SUPPORT.—A father's promise to pay his son for keeping him creates a valid debt.

EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO ENFORCE a doubtful or controverted demand or claim, merely because the heirs may think it well founded, unless they are willing to give indemnity for costs.

J. Bassel, for the appellant.

W. S. Stuart, for the appellee.

²⁶² **BRANNON, J.** John P. Orr was appointed in July, 1891, administrator of W. H. Harris, and this is a suit by Jennie Harris, widow of said Harris, against Orr, to settle his accounts as administrator, and to charge him with assets which, by neglect, he had not collected, among them, with certain money found on the person of Harris after death, and which

went into the hands of a son, A. B. Harris, and his wife, and was converted to their own use by them and another son, W. B. Harris. The commissioner and the court's decree charged this money, as well as some other, to Orr, and he appeals.

A demurrer to an amended bill was overruled, and of this Orr complains. The point made to sustain this demurrer is that the bill only charges "that the administrator has refused to collect, and to institute proceedings for the purpose of collecting and getting possession of, the personal estate of said W. H. Harris." It is said this is vague, and that the bill does not charge that Orr failed to collect solvent debts, or that debts which were collectible had been lost by want of diligence; but this bill does do this. It specifies certain debts on certain persons, and alleges that this money was found on the body of the dead man, and taken possession of by A. B. Harris and wife, and that they and another son, W. B. Harris, entered into a conspiracy for the purpose of fraudulently concealing and converting it to their sole use, with intent to cheat the widow out of her share; and that the administrator knew of this conspiracy, and acquiesced in it, and that, though requested by distributees to sue A. B. Harris and W. B. Harris for the money, he failed and refused to do so, and that the demand was solvent when the administrator qualified, but had been lost by reason of subsequent insolvency. I think the bill good.

Next, as to the merits. The proposition of the plaintiff is to make Orr pay out of his own pocket money which he never received—the money on the person of the deceased at his death. To do so requires quite a strong showing. We must find him guilty of gross neglect in not suing for it. Let us see what degree of diligence the law exacts of personal representatives. "Executors pursuing such a ²⁶³ course in the management of the testator's assets as a judicious man, looking alone to his worldly interests, would, under the circumstances, pursue in his own worldly affairs, will be justified in so doing": *Kee v. Kee*, 2 Gratt. 117. Such is the general rule: *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21, note. Ordinary care and judgment, not the highest, are required of him: *Moore v. Eure*, 101 N. C. 11, 9 Am. St. Rep. 17. "Acting in good faith, within the requirements of law, executors and administrators will be treated by the court with liberality and tenderness. They will not be held responsible for losses in the absence of willful misconduct or fraud, especially when acting un-

der advice of counsel. The executor will not, in such cases, be held responsible for mere error of judgment. And where he has acted with what men of sense and experience would deem reasonable discretion in their own affairs, his acts and omissions in good faith will not render him liable for losses arising in consequence, especially during a period of doubt and difficulty. He is not to be held liable as an insurer of the estate": 2 Woerner on Administration, sec. 336. W. H. Harris was an old man of seventy-six years when he died, April 16, 1891. Three years before, he married a young girl of eighteen years, who shortly left him, and returned to her home. Harris was paralyzed, and was taken to the home of his son, A. B. Harris, where he lay for about a year, utterly helpless, a large man of over two hundred pounds weight, needing the greatest constant attention, often lifted from his bed ten times a night, and was watched, supported, and cared for by A. B. Harris and his wife, and another son, W. B. Harris, a single man, who had his home at the house of his brother, A. B. Harris. When the old man died a belt containing six hundred dollars in gold and one hundred dollars currency was taken from his person, and handed by the person who took it from his person to Mrs. A. B. Harris, by direction of her husband. There is evidence tending to show that this money was put in a chest, and in a few days was stolen—at least, disappeared—but does not seem to be further accounted for. It is claimed that the two brothers, A. B. and W. B. Harris, got and converted this money to their own use, and it ²⁶⁴ is for negligence in not suing them as administrator and collecting this money that Orr is charged with the whole sum and interest. Do the facts charge him under the above principles of law? Was this alleged demand in favor of Harris' estate of such a character as called on Orr to sue, or was it so doubtful as will excuse him from suing, either because of doubt of recovery of judgment or from insolvency of the parties? Schouler on Executors, section 274, states the law to be that: "The duty to pursue or collect depends largely upon the sperate or desperate character of the claim itself; as to whether, for instance, the title of the deceased to such a corporeal thing or muniment can be clearly established against the adverse possessor or the reverse; or again, whether such a claim or debt is probably collectible or not, considering the debtor's own solvency. A representative is not chargeable for assets without reference to the fact whether they were good, doubtful, or desperate when he as-

sumed the trust, nor in any case aside from the question of delinquency or culpable neglect on his part in realizing their value, or procuring them according to the means at his disposal. No executor or administrator is bound to sue on a worthless debt, but ordinary care and diligence is the true criterion of his duty." Now, that this money disappeared is certain. If it did not come to the hands of the two sons, they would not be liable. If they did not get it, whom would Orr sue? The mere fact that it was taken from the dead man, and handed to Harris and wife, would not, if stolen by others, create a liability upon them. If Orr sued, he ran a risk of the evidence in this record to show that it was stolen. But suppose the money was not stolen, but went to the hands of the two sons. They claimed it. They prove, not merely by themselves, but by disinterested witnesses, that their father agreed and contracted with them that they were to have all the property he had for supporting and maintaining him. He had but a small quantity of rough, worn, country house furniture, which he gave to a daughter in law and a granddaughter, and a note of one hundred dollars on Nutter, his son in law, which he hardly expected him to pay, as Nutter had taken him and his illegitimate child some time prior to this into his house, and kept them for months under promise ²⁶⁵ of pay, as evidence goes to show, and a debt of ten dollars on Powell and twenty-five dollars on Orr. The Nutter and Powell notes never came to Orr's hands. Reflect that this old man was a paralytic, gross in weight, a child, and utterly helpless, and that these two sons and the family of one lifted him from bed, watched over him day and night for a year, exhausted themselves, and his young wife, now suing for her thirds, had abandoned him in his terrible condition. What more natural or probable than that he did say to his sons that, if they would keep and support and care for him, they should have this money for pay? And who more entitled to it? They alone watched him in his helpless, dying days. Other children and the wife did not do so. This is a contract. They could not recover anything without that promise; but as the claim for compensation is so highly meritorious when compared with the right of the wife and other children, courts readily listen to the old man's declarations promising his sons to pay them. This is clearly proven. He frequently declared to neighbors around him that all his personalty was to go to these sons. This is not a gift. If it were, delivery of the money would

likely be necessary to effectuate it as a gift *inter vivos* or *donatio mortis causa*: *Smith v. Zumbro*, 41 W. Va. 623. But if a father promise to pay a son for keeping him, it is a valid debt: *Riley v. Riley*, 38 W. Va. 283; *Cann v. Cann*, 40 W. Va. 138; *Plate v. Darst*, 42 W. Va. 67. I think it is shown that once this money was in A. B. Harris' hands, when he brought it from the bank, and received some of it. The old man told witnesses that it was the boys' money, but that he preferred to keep it on his person, as the sons, or one of them, was inclined to drink, and might waste it. The old man told Orr that the money belonged to the sons. This is not competent evidence for Orr, but bears on his honest intention in the matter, and tells us why any man might not sue, when he had been told by the old man himself that it was not his own money; the more so when, in a suit, he could be used as a witness in behalf of the sons to prove for them these declarations. No one but Riggs, husband of one of the distributees, demanded a suit. He had no interest. His ²⁰⁶ wife told Orr not to sue. Another daughter, Mrs. Nutter, and her husband, told him not to sue. I think it true that an attorney for the widow asked Orr to sue. Orr went to these two sons, demanded of them all property and estate of their father, and was informed that he had left none; that what he had belonged to them. Now, can we charge Orr with gross negligence, under these circumstances, in not suing? The record shows that if he had sued he would have met with bitter and prolonged resistance, and that the result would have been doubtful. The evidence to defeat a suit is very considerable, to say the least. Would not a prudent man have hesitated to bring so doubtful a suit in his own case?

Next, as to solvency. Before we make Orr pay this seven hundred dollars, we must be able to say that it was collectible, but was lost through his neglect. It is shown that A. B. and W. B. Harris had two tracts of seventy-two and fifty acres, and that on the 17th of August, 1891, A. B. Harris mortgaged the seventy-two acres to a building association for five hundred and twenty dollars, and that on the 25th of February, 1892, they mortgaged both tracts to the association for a further loan of two hundred and sixty dollars, showing they were borrowing, and that these large liens were on the land, before judgment could have been gotten by Orr. It is shown that when their father died, in 1891, they owed many other debts, and that they were bankrupt. Judgments began to go against them in

1893, and the lands were sold for these debts, and brought eleven hundred and sixty-six dollars and fifty-four cents, leaving a large indebtedness unpaid. Now, this decree makes Orr pay the whole seven hundred dollars and one hundred and sixty-four dollars and ninety-four cents interest, when these lands would not have paid those sums after the two fixed liens or the first lien alone. The Harrises had no other attainable estate, as executions were returned "No property." But I repeat, though at the qualification of Orr there were no judgments, yet the Harrises were overwhelmed in debt, and judgments soon went against them. Now, we are asked to assert and hold that, if Orr had sued, he would have got judgment before all other judgments and made the money. We cannot ²⁶⁷ say so, because: 1. The judgment could not have been paid in full after one or both mortgages; 2. Because we may fairly say that Orr's suit would have been litigated long in the circuit court, and that these divers debts of others would have been thereby hastened to suit before a justice, as they were, and thus had precedence. Under these circumstances, it does seem to me that we cannot liken this doubtful, controverted claim to a plain note or other uncontroverted, solvent demand, and charge it on Orr. I refer to what is said as to good faith and error of judgment of fiduciaries in *Winton v. Stewart*, 43 W. Va. 711, 714. But this is not the sole defense of Orr. His conduct seems to show good faith. He did not refuse to sue, but, when requested by Riggs to sue, he promptly said he had no means to carry on the suit, but, if they would indemnify him against expense and the outlay, he would sue at once. He always said so. The twenty-five dollars he himself owed the estate was the only means to employ lawyers, get witnesses, pay fees, pay his own hotel bills and service, to encounter a suit sure to be fought to the end, as this record fairly shows. The two sons resisted the demand from the beginning. "Executors are not bound to enforce doubtful claims at the expense of the estate. But if the heirs will give them indemnity for the costs, it is their duty to assert such claims": *Griswold v. Chandler*, 5 N. H. 492. This shows he may demand indemnity to protect the estate, even if it has assets available for the suit; but Orr had none at all. "An executor is not bound to enforce a doubtful claim merely because some of the heirs may think it well founded," unless indemnity is given: *Sanborn v. Goodhue*, 28 N. H. 48, 58, 59 Am. Dec. 398. This right to indemnity is held in *Utley v. Rawlins*, 22 N. C. 438,

Harrington v. Keteltas, 92 N. Y. 45, Hepburn v. Hepburn, 2 Bradf. 74, and Andrews v. Tucker, 7 Pick. 250. 2 Woerner on Administration, section 324, lays this right to indemnity down as good law. In reference to it, Schouler on Executors, section 273, says: "The duty of an executor and administrator to pursue and recover chattels depends in great measure upon the means at his command for so doing, and the same may be said respecting the collection of dues to the estate. Whether slender assets shall be used in litigation ²⁶⁸ for procuring personal property adversely held, or in realizing doubtful claims, the rule of prudence must decide; but it is certain that the representative of an estate is not bound to litigate or undertake the enforcement of doubtful rights on behalf of the estate out of his own means; and if kindred, legatees, or others interested in prosecuting the right think the effort worth making, they should at least offer to indemnify the representative against cost." And Orr had right to demand indemnity to protect himself and the estate, the more especially as two of the heirs told him not to sue. Decree reversed because it charges Orr with the seven hundred dollars, and case remanded.

EXECUTORS AND ADMINISTRATORS ARE REQUIRED to exercise only ordinary care and reasonable diligence in managing the estate they represent: Moore v. Eure, 101 N. C. 11, 9 Am. St. Rep. 17. When acting in good faith and without willful default or fraud, they are not responsible for any loss to the estate: Webb's Estate, 165 Pa. St. 330, 44 Am. St. Rep. 666. See, too, In re Kohler's Estate, 15 Wash. 613, 55 Am. St. Rep. 904, and the extended note to Tarver v. Torrance, 12 Am. St. Rep. 311-316.

AN ADMINISTRATOR ACTING UNDER THE ADVICE OF COUNSEL is protected, particularly when such advice is as to the advisability of bringing or defending suits: Pearson v. Gillenwaters, 99 Tenn. 446, 63 Am. St. Rep. 844.

STATE v. MCGUIRE.

[46 WEST VIRGINIA, 328.]

BONDS—ACTION ON—PLEADING.—A declaration upon a bond need declare upon it only according to its legal effect.

BONDS—LIABILITY OF SURETIES.—The law in force at the time of the execution of an official bond, giving it a certain legal effect, is part of the bond, and the sureties must be held to have known such law and to have engaged with reference thereto.

BONDS—DEFECTS IN.—If an official bond contains some valid provisions and others which are invalid, the latter, if separable, may be ignored, and the bond held valid.

OFFICIAL BONDS—DEFECT, WHEN IGNORED.—If the official bond of a sheriff provides for the faithful discharge of his duties, and that "he shall account for and pay over all money that shall come to his hands for school purposes for the year 1893," the phrase "for the year 1893" may be ignored and the bond be held to cover all school money received by him during any year in his term of office.

BONDS—DEFECTS IN, WHEN IGNORED.—If the statute states that an official bond not taken conformably to it shall be void, a bond departing from it is void; but, where the statute merely prescribes a condition, and does not declare a bond not conforming to it void, a clause not warranted by the statute, or contrary to it, is alone void, and may be eliminated and ignored, while the remainder of the bond may be held valid.

BONDS—PLEADING.—If, in an action on an official bond, the only plea is a plea of payment, it is not necessary to produce the bond.

Watts & Ashby, for the plaintiffs in error.

Mollihan & McClintic and W. G. Mathews, for the defendant in error.

329 **BRANNON, J.** This was an action of debt in the circuit court of Webster county by the state, for the benefit of the United States School Furniture Company, against P. J. McGuire, and the sureties in an official bond given by him, as sheriff, for school moneys, in which there was judgment for plaintiff.

The defendants complain that the court overruled a demurrer to the declaration, and the point on which chiefly they would rest this assignment of error is that the bond, as the declaration states, has the condition reciting McGuire's election as sheriff, and providing that if he should "faithfully discharge the duties of his office of sheriff of Webster county, and account for and pay over all money that shall come into his hands by virtue of his said office for school purposes for the year 1893,

as provided in section 46 of chapter 45 of the code, then the above obligation to be void," and that, though the letter of the bond limited ³³⁰ the liability of the sureties to the year 1893, the declaration does not show that the default of the sheriff was in 1893, or that the transaction alleged (the non-payment of certain school drafts drawn by boards of education on the sheriff) had reference to 1893. The declaration alleges that the sheriff, while in office, collected certain amounts of money belonging to these districts, and that drafts (dated in 1893 and 1894) on him were not paid. The bond was dated October 2, 1893. So we have the question whether the bond binds the sureties for payment of money collected at any time during the term, or is limited to moneys collected for 1893. A declaration upon a writing must declare upon it according to its legal effect. If it does this, no more can be required. If, when brought under legal construction, this bond limits the liability of its makers to school money received in 1893, then the declaration is perhaps faulty, as it fails to allege that McGuire collected money of that year to pay this draft; but, if its effect covers money of any year during the term, then the fault does not exist in the declaration. Indeed, as it charges that the sheriff "on and after the second day of October, 1893, and during his continuance in office," collected and received money for the use of the boards of education of Fort Lick and Glade districts, we may say it charges that he received money of 1893.

But, going back to the question mentioned above, does this bond cover money of other years than 1893? I hold that it does. The words in it, "for the year 1893," are as surplusage—in fact, without sanction of law, and therefore contrary to law. Section 46, chapter 45, of the code of 1891 provides that the sheriff shall receive and disburse all school moneys for the various districts of his county, and requires the county court to require of him, in addition to his general bond, a special bond as to school moneys, and, in prescribing its penalty—merely in prescribing its penalty—directs that the penalty shall be "equal to double the amount of school money which will probably come into his hands for school purposes during any one year of his term of office." This does not limit the obligation of the bond to one year, but the statute plainly means that it shall cover any school money received during his term; and therefore the insertion of those words in the bond was ³³¹ the insertion of a limitation upon its binding

force unsanctioned by, and contrary to, law. But counsel say: "Look at the letter of the bond. It binds the sureties only for money of 1893." That might be so if the bond were between private individuals—a private contract; but this is a public bond, given under statute, contemplating that it shall cover all school money received by the sheriff during his term, and not contemplating such a restriction, and, when the sureties signed it, they must be held to have known that the law required such a bond, and that it had a certain legal force. Sureties stand on "the letter of the bond," it is true, and it cannot be stretched, as a general rule; but the law in force at the execution of the bond, giving it a certain legal effect, is part of the bond, and sureties engage with eyes open to that law: *State v. Nutter*, 44 W. Va. 385. This view is strengthened when we reflect that the statute requiring this bond does not specify its condition, and therefore we must go to the general provision prescribing the condition for official bonds; and there we find that the code, chapter 10, section 6, says that, in an officer's bond, the condition "shall be for the faithful discharge by him of the duties of his office and for accounting for and paying over, as required by law, all money which may come to his hands by virtue of the said office." This covers "all money which may come to his hands by virtue of the said office," and the presence of the clause "for the year 1893" in McGuire's bond is a departure from this statute, and a violation of it. The law will purge the bond of this phrase. Where the statute says that a bond not taken conformably to it shall be void, a bond departing from it will be void; but where it merely prescribes a condition, and does not declare a bond not conforming to it void, a clause not warranted by the law, or contrary to it, is alone void, and will be eliminated: *Justices v. Wynn*, Dud. 22. In *Newman v. Newman*, 4 Maule & S. 70, Lord Ellenborough said: "Admitting the condition of this bond to be ill as to one part, it seems that it may be well as to other parts, for you may separate at the common law the bad from the good." The old maxim, "*Utile per inutile non vitiatur*," solves the question. It was unanimously agreed in *Pigot's Case*, 11 Coke, 27, that in case certain conditions of a bond are against ³³² law, some good and lawful, "the conditions which are against law are void, the others stand good." "Though the condition of a statutory bond contains more than is required, it will not invalidate the bond, if the good can be eliminated from the bad": 4 Myers' Federal Decisions, sec.

234; *Farrar v. United States*, 5 Pet. 373. *Gibson v. Beckham*, 16 Gratt. 331, follows the old law in holding that where a court taking a bond makes a mistake "by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute, by express words or necessary implication, makes it wholly void, the bond is not void. The good shall not be vitiated by the bad, and the bond may be sued on, so far as the conditions are good, as a statutory bond." It is not asserted that this bond is void, but that the clause "for the year 1893" limits the force of it to money of that year. But I cite the above law to show that we must eliminate that clause from the bond. This leaves the bond to say that the sheriff shall faithfully discharge his duties, and account for and pay over all money coming to his hands by virtue of his office for school purposes, as provided in section 46, chapter 45, of the code—provisions amply broad to cover all money received during his term. The clause for the faithful discharge of duties would be enough to cover failure to pay the drafts, without the clause to pay over money: *Poling v. Maddox*, 41 W. Va. 781; *Murfree on Official Bonds*, sec. 189. Though not essential to the decision, I think the declaration alleges the reception of money of 1893, and it would make no difference that some of the drafts were drawn in 1894. Courts struggle to make public bonds answer public justice.

The declaration says that the school drafts were indorsed, "Pay to sheriff of Webster county, or order for collection and remittance for account of U. S. School Furniture Company," and sent to McGuire, and received by him, and that he kept them, converted them to his own use by receiving credit for them in his settlements with the boards of education, and never paid them to the furniture company, and refused so to do. It is claimed that the sheriff was thus made the company's agent, and the sureties are not liable. This point is untenable. They were sent to the sheriff for payment and remittance, as the indorsement ³³³ shows. Surely, if a person risks sending to a sheriff a school order, to be paid and remitted, he does not make him his agent to collect, and absolve liability as sheriff. He intrusts it to him only for payment, just as if, standing in his office, he would hand him the draft and request payment. Was there any other intention? If he retained the orders as sheriff, he was bound as sheriff to pay them. The owners could sue on the bond, and need not sue the sheriff alone in assumption.

The court refused an instruction that the plaintiff must produce the bond, but, as the only plea was payment—a plea of confession and avoidance, admitting the execution of the bond—it was not necessary to produce it: *Hamilton v. Moore*, 4 Watts & S. 570.

Some instructions were given for plaintiff. I see no error in them. They involve nothing of importance requiring discussion, and as the case does not go back for new trial, and the instructions are not discussed in the brief, it is needless to discuss them.

Affirmed.

OFFICIAL BONDS, DEFECTS IN.—If a statute which prescribes the conditions and terms of official bonds declares that all bonds not taken pursuant to it shall be void, they will be held void; but unless the statute expressly so provides, only those parts or conditions that are contrary to the provisions of the statute will be void, and the rest of the conditions will be held good: See the notes to *People v. Hartley*, 82 Am. Dec. 760; *Stephens v. Crawford*, 44 Am. Dec. 688.

CRIM *v.* ENGLAND.

[46 WEST VIRGINIA, 480.]

EXECUTORS AND ADMINISTRATORS — JUDGMENT AGAINST—EFFECT ON SURETIES.—A judgment against an executor for a debt, or a decree for a balance in his hands, is prima facie evidence against the sureties in his bond, and is conclusive against them as to the existence and justness of the demand.

EXECUTORS AND ADMINISTRATORS.—REASONABLE FEES PAID COUNSEL are always allowed as credits to an administrator, and, if not paid by him, are a lawful charge against the assets of the estate in his hands.

EXECUTORS AND ADMINISTRATORS — LIABILITY — NOTES AS DISCHARGE.—A valid demand against the assets of a decedent is not discharged by notes given by the administrator therefor, signed by him with the addition to his name of the words, "Administrator of Trahern, deceased."

EXECUTORS AND ADMINISTRATORS — ATTORNEYS' FEES—LIABILITY OF SURETIES.—If attorneys' fees for services rendered an administrator during administration are regularly allowed by the court and payment directed out of assets found to be in the hands of such administrator, such fees are a valid demand against the sureties in his bond.

GIFTS BETWEEN PARENT AND CHILD.—If a father orally gives his son before the former contracts a debt an undivided half of a tract of land, saying that it is to be the west end of the tract, the gift is sufficiently certain and definite, and may be en-

forced free from such debt if the donee has made valuable improvements.

GIFTS — CONSIDERATION — POSSESSION — IMPROVEMENTS.—If a gift of land is made orally on a meritorious consideration, mere delivery of possession does not render the gift enforceable, but if, on the faith of the gift, the donee makes valuable improvements, the gift may be enforced in equity by a conveyance of the legal title.

J. H. Woods, for the appellant.

Dayton & Dayton, F. O. Blue, and W. B. Kittle, for the appellees.

481 BRANNON, J. In 1875, James W. Trahern and John F. Trahern executed a bond, as administrators of James Trahern, deceased, in which John England and William Nestor were sureties. In a chancery suit brought in 1876, in the circuit court of Barbour county, by Francis White, executor, etc., against said administrators and the heirs of James Trahern, to administer his estate for payment of his debts, a decree was pronounced, in 1880, finding the administrators in arrear in a certain sum for assets in their hands, and directing the payment out of the same of two debts—one to Bradford of five hundred and thirty-one dollars and fifty cents, and one to Brown of seventy-seven dollars and forty-three cents—which debts were later assigned to Joseph N. B. Crim. John England died leaving land, part of which he devised to his sons, Jasper and James England, and part he directed to be sold, and its proceeds divided among certain of his heirs. William Nestor died leaving land, which descended to his heirs. In February, 1886, Crim brought the chancery suit now in hand for several purposes, particularly to subject to his debts the land devised to Jasper and James England by their father, John, and the land left by William Nestor in the hands of his heirs, and to subject some purchase money in the hands of Lawless, a party who purchased land devised by England to be sold, and to make the England legatees, who got money from such land, refund the same for the payment of his debts. Jasper England defended, but James England and the Nestor heirs did not. The court dismissed the bill, and Crim appealed.

482 Jasper England's answer sets up, in defense of his land, that the demands of Crim never were debts binding on the estate of James Trahern, and therefore not chargeable on its assets in the hands of James W. Trahern and John F. Trahern, his administrators, and therefore could not bind England as

a surety in the bond of the administrators. It also sets up the further defense that his father, John England, in his lifetime, gave him the tract of land sought to be subjected by Crim, and that, under the promise of the father that he should have it, he took possession of and improved it, and resided upon it, claiming it adversely to the world; so that it is, in no event, liable to Crim's demand.

The first defense made by Jasper England presents the question of the effect of the decree in the White suit in favor of Bradford and Brown for their debts, now owned by Crim, and declaring that they were chargeable upon the personal assets of James Trahern, deceased, and finding in the hands of his administrators a sum sufficient to pay those debts, and decreeing that out of that fund his administrators should pay those debts as primary charges upon that fund. John England, the surety in the bond, not being a party to that suit, but the administrators being parties, what was the force of that decree upon England, as a surety in the bond, to show that sufficient assets were in the hands of the administrators to pay those debts, and to show that those debts were valid debts binding those assets, and therefore should have been paid by the administrators? Does that decree bind England? If it does, his lands are chargeable with the debts. The general law is that a judgment against an administrator or executor for a debt, or a decree for a balance in his hands, is conclusive upon the sureties in his bond, though they are not parties. The supreme court held that "sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and nonpayment of them over, to the same extent to which the administrator himself is bound. They cannot attack collaterally a decree against him on such a subject": *Stovall v. Banks*, 10 Wall. 583. See 2 Brandt on Suretyship and Guaranty, sec. 580; 2 Black on Judgments, sec. 589; 1 Freeman on Judgments, sec. 180. But in the Virginias it is not conclusive, but only *prima facie*: *State v. Nutter*, 44 483 W. Va. 385; 1 Lomax on Executors, 331; *Hobson v. Yancey*, 2 Gratt. 73; *Craddock v. Turner*, 6 Leigh, 116. I am of opinion that the finding of assets in the administrator's hands is not conclusive, but *prima facie*, because of a peculiar Virginia statute found in the code of 1891, chapter 85, section 24, that no executor or surety shall be chargeable beyond assets by reason of any omission or mistake in pleading, and may offer any defense admissible in an action against the executor suggesting

a devastavit. I think it is that which makes the difference between our law and the general rule. But that does not touch the point of how far a judgment or decree establishing a creditor's debt against the executor is conclusive as to its existence, amount, and justness. Here it is conclusive, not prima facie: Per Judge Green in *Davis v. Rowe*, 6 Rand. 416; 2 Lomax on Executors, side p. 458, top p. 721. This is under the general principle stated in *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774; that "a judgment in favor of A against B for a debt is conclusive, not only between the parties, but even as to strangers, to establish the existence and amount of the liability, and strangers can only impeach for fraud or collusion": *Morris v. Murphey*, 95 Ga. 307, 51 Am. St. Rep. 81. But let us examine. The decree in the White case declares that the debts in question had grown out of the administration of Trahern's estate, and were primary charges on the personal assets. Depositions show that Bradford and Brown were attorneys for the administrators in their administration. Reasonable fees paid counsel are always allowed as credits to the administrators: *Schouler on Executors*, sec. 544; *Lindsay v. Howerton*, 2 Hen. & M. 9. If the administrator may lawfully pay counsel fees, it follows that services rendered, and not paid, but which he wrongfully neglected to pay, may be decreed to be paid out of assets found in his hands unexpended.

Counsel for England say that John England was dead when the debts arose, meaning when the administrators gave their notes therefor. I see no force in this fact. When he signed the bond, he undertook for the administration of the assets by his principals, whether he was dead or alive, during the administration; and, if Bradford and Brown became entitled to payment out of the assets during the progress of administration, how can it matter whether ⁴⁸⁴ the surety was dead or alive at the time when the service creating a charge on such assets was performed? This argument overlooks the fact that counsel fees are, under our law, a part of the very charge of administration, and as binding on the estate as a debt created by the decedent in life—more so. It is contended that, as the administrators gave Bradford and Brown notes for this compensation, signed by them, with the addition after their names of "Administrators of James Trahern, deceased," these words are mere descriptio personarum, and have no effect to change the legal liability thereon, and they are the individual notes of the administrators personally, and not the notes of the es-

tate. As notes they are the notes of those parties. Of their intrinsic force, per se, they bind them only, as the words in notes signed, "James Bennett, Agent for Lewis County," were held to be notes of Bennett, not binding on the county: *Exchange Bank v. Lewis Co.*, 28 W. Va. 273. See *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761; *Early v. Wilkinson*, 9 Gratt. 71. But that was a debt which Lewis county could not contract. If an action at law were brought on such notes, it would be proper to sue the signers as individuals, ignoring those words, or, if used, they would be rejected as mere description of the signers. The notes bound the signers personally. But the question is, Did those notes debar Bradford and Brown from looking to the estate for services rendered it? The taking of a note for another note or an account does not operate as discharge, unless so expressly agreed, but action on the old note or account may still be maintained. The taking of the note of a person not before bound is *prima facie*—only *prima facie*—payment; but these parties, having assets payable to these debts, were personally bound, and the very fact that they added the words, "Administrators of James Trahern," indicates that there was no intention to discharge the estate. There may have been other evidence before the commissioner in the White case touching these services. There is the decree, and it is proven in this case that they were rendered. Therefore, treating that decree as but *prima facie*, and I doubt whether we should not say it was conclusive, we see nothing to repel its *prima facie* showing. We are cited to Schouler on Executors, section 256, saying that the executor or administrator cannot create a debt ⁴⁸⁵ against the estate. Clearly he cannot make a contract on a consideration new and independent of the decedent, as only his obligations bind his estate. But how as to necessary expenditures or liability for administration? The same section says, as an exception, the executor may, on principle, contract for all necessary matters relating to the estate, and "the immediate and particular result is that, a sufficiency of assets being presumed as an element of the undertaking, he contracts, as upon his personal responsibility, to keep good that sufficiency." He is personally liable for the contract, but is allowed to pay out of the assets, and, the contract being lawful, if he does not so apply them the party can charge him individually. Say that he is personally liable. So he is, for the fund found in his hands applicable thereto, and, as that fund came from assets, the sureties

undertook that he would apply that fund properly. How does the fact that he is also individually liable change the case? 2 Lomax on Executors, side pp. 458, 459; Davis v. Rowe, 6 Rand. 416.

I come now to the question whether the land claimed by Jasper England is liable to these debts. I confess that, up to this point in this opinion, I have written under the impression that it was liable, but a re-examination has changed that impression. My trouble was uncertainty as to the land claimed by Jasper to have been given him by his father; for, both as to sales and to gifts, there must be legal certainty in the contract of sale or gift, both with reference to the terms of sale and the description of the property: Mathews v. Jarrett, 20 W. Va. 415; Gallagher v. Gallagher, 31 W. Va. 9. In the former case the court held as too uncertain in description for enforcement a sale of "ten acres of land on the west side of the branch on the Keeny place, where Mathews now resides." In Westfall v. Cottrills, 24 W. Va. 763, a sale of "forty acres off the Spring Fork and of my tract of one hundred and forty-seven acres on Beech Fork" was held too indefinite. These two cases hold that "where neither the contract nor proof identifies the tract or boundaries of the land, nor refers to anything by which it may be identified with reasonable certainty," it will not be executed in equity. In the present case, John England, owning a tract of land said to contain two hundred and one acres, in 1866 gave Jasper, as he ⁴⁸⁶ claims, one hundred and five acres, being half, known as the "west" or "south" end. Jasper's evidence is incompetent in behalf of himself: Smith v. Turley, 32 W. Va. 14. But, if used against him, I thought his own statement showed uncertainty in description of the land; for he says his father gave him a certain tract of thirty-four acres, acquired by his father from Nicola, and "enough off of the other end to make us even—me and my brother James, one hundred and five acres apiece. The thirty-four acres was already identified by metes and bounds, and that I was to take the land adjoining that of my father's farm to make my equal part." I thought this uncertain. What part of the residue outside of the thirty-four acres? Where are the lines? How could the court specify boundary to go in a deed? But later the thought comes to me that it is a gift of not a special parcel, but half of a tract. Jasper's evidence, as a whole, is to be so interpreted. But exclude that, James England's evidence so shows. So does Nestor's and Edward's. I

hold that the evidence shows a gift of the undivided moiety. A sale of an undivided moiety would be enforceable, and so with a gift, I suppose, if other necessary elements are shown. Edwards' evidence shows that John England and his son Jasper, and Edwards, built a fence dividing the Jasper part from the residue, and the father said that the part Jasper lived on belonged to him. This seems to be a definition by the parties of the land, if we look at the pre-existing act of donation, or as a new one, and goes far to supply certainty as to the land intended to be given. The cases cited above allow this oral testimony to help out indefinite description. But view it as a gift, not of a part, but a moiety, and the taking possession of a particular end would give Jasper a preferable right to that end in equity—at any rate, vest a right calling for its proper legal treatment, in case of partition in equity. The father's will gave the tract to the two sons, Jasper and James, to be equally divided. If Jasper already had a vested right, enforceable against his father, this would not destroy, but confirm, it.

Having gotten rid of the question of certainty as to the description of the land, the next question is, Has Jasper England shown a right to the land which would enforce ⁴⁸⁷ a deed from his father? It is not a purchase on valuable consideration. If it were, mere delivery of actual possession would be an act of part performance, calling for specific performance. Jasper seeks to defend himself on the ground of a gift, based on meritorious consideration. Here there must be more than mere possession. There must be what takes the place of valuable consideration in the case of a sale. There must be expenditure of money or labor in valuable improvements. Jasper left his father's roof in 1866, went into actual possession, built two houses upon the land, planted an orchard, cleared and fenced land, and lives yet on the land; so he meets this demand. It is well established that a gift of land based on meritorious consideration, by reason of which the donee has been induced to make valuable improvements, will be enforced in equity by conveyance of the legal title: *Frame v. Frame*, 32 W. Va. 463; *Harrison v. Harrison*, 36 W. Va. 556; *Burkholder v. Ludiam*, 30 Gratt. 255, 32 Am. Rep. 668; *Halsey v. Peters*, 79 Va. 60. So I conclude the dismissal of the bill as to Jasper England was right, as his land is not liable.

Next, as to the land devised by John England to James England. I cannot see how the bill was dismissed as to this land.

James England did not answer. His case is different from Jasper's. He was not put in possession, but continued living with his father in the house on the land given him by the will, until his father's death. He made no improvements. Hence, if a gift were made to him, his possession was a mere continuance to dwell with his father as before, not a possession referable alone to the gift. His land is liable to Crim's debts. The land left by William Nestor, a surety in the bond, in the hands of his heirs, is liable to Crim's debts. So is any balance in the hands of James Lawless, the purchaser of the land sold under the will of John England, and proceeds of its sale in the hands of John England's executor. So are the legatees of John England liable for what they derived from the sale of his land.

I wrote up the case as to Samuel Moats, as he answered, and Crim's counsel discussed the case as to him, when I discovered that Moats is not a party to the suit, and the bill contains no matter ⁴⁸⁸ touching him; and therefore I do not pass on his case in any manner, and the court decides nothing as to him. We reverse the decree, and dismiss the bill as to Jasper England, so far as it seeks to make his land devised to him by his father liable for Crim's debts, and discharge his said land therefrom, and we remand the case for further proceedings proper in the case, as above indicated, and further as equity requires.

EXECUTORS AND ADMINISTRATORS.—ATTORNEYS may be employed to assist and advise executors and administrators, who on their part are entitled to be compensated for moneys necessarily paid for such services. The duty of compensating an attorney rests primarily on the executor or administrator, who is liable to a personal action therefor: *Extended note to Schlicker v. Hemenway*, 52 Am. St. Rep. 118. See, too, *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292.

A JUDGMENT AGAINST AN ADMINISTRATOR or executor for money due from him, as such, to the estate, is binding upon the sureties of his bond: *Nevitt v. Woodburn*, 160 Ill. 203, 52 Am. St. Rep. 315. But see *Gibson v. Robinson*, 90 Ga. 756, 35 Am. St. Rep. 250.

EXECUTORS AND ADMINISTRATORS—NOTES OF.—An executor or administrator cannot bind the estate which he represents by any promissory note he may make. Such note can only bind himself: *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653.

A PAROL GIFT OF LAND TO A CHILD, accompanied by permanent improvements, gives an indefeasible title to have the contract executed: *Young v. Glendenning*, 6 Watts. 509, 31 Am. Dec. 492. See, further, the monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 742.

RALSTON *v.* WESTON.

[46 WEST VIRGINIA, 541.]

MUNICIPAL CORPORATIONS—STREETS—DEDICATION—ESTOPPEL.—A person not the original owner of land, but claiming under a plat and deed by which a street has been dedicated to the public, is estopped from denying such dedication.

LIMITATION OF ACTIONS AGAINST STATE AND CITIES.—The statute of limitations applies to municipal corporations and to the state in like manner as to individuals in similar cases, but it does not apply to the sovereign rights and property of the people of the state dedicated to the public use.

LIMITATIONS OF ACTIONS—HIGHWAYS—EASEMENTS. The public easement in highways, streets, and alleys dedicated to the use of the public by individuals, or under the exercise of the right of eminent domain, cannot be lost to the people through the statute of limitations by the negligence of the public authorities or the unlawful acts of individuals.

EASEMENT — HIGHWAYS — PRESCRIPTION—ADVERSE POSSESSION.—An individual cannot destroy the public easement in highways, streets, and alleys by a claim of prescription, adverse possession under the statute of limitations, or equitable estoppel.

EASEMENTS — HIGHWAYS—NUISANCE—ABATEMENT. The public easement in all of the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith by private interests is a continuing public nuisance, subject to abatement whenever the growing necessities of the people require such easement for the uses to which the land to which it attaches was originally dedicated.

MUNICIPAL CORPORATIONS — STREETS — LACHES—LIMITATIONS.—A city has no alienable interest in the public streets or alleys thereof, and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction.

EMINENT DOMAIN—COMPENSATION FOR STRUCTURE IN HIGHWAY.—Private property cannot be taken or damaged for public use without compensation, and if public officers mislead, either by acts of omission or of commission, a private person into building a costly structure over the line of a public highway, street, or alley, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, they thereby take private property for public use without compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, and must pay the damage to the structure by the removal thereof. This rule does not apply to one who knowingly invades a highway—he must bear the loss occasioned thereby, and not the public.

E. A. Brannon, for the appellant.

W. P. Brannon, for the appellee.

545 DENT, P. This is a controversy between the town of Weston, defendant, and Er Ralston, plaintiff, over the right to a public easement in a small strip of land thirteen and one-half feet by seventy-two and one-half feet, being a part of Water street, as originally laid off and dedicated to public use at a very early date, almost beyond the memory of man, by Maxwell and Stringer, who sold lot 12, adjacent to such strip, to those under whom plaintiff claims title. While plaintiff raises the question of dedication and acceptance, as is usual in similar cases, his main reliance is on adverse possession under a claim of title for a much longer period than the statute of limitations. From the evidence this case clearly comes within the rules of law and principles determined in the case of Taylor v. Philippi, 35 W. Va. 554, and Jarvis v. Grafton, 44 W. Va. 453, for the reason that the original occupation of the strip in controversy, and the continuance thereof, was under the sufferance and permission of the municipal authorities, and no claim was made thereto, under the statute of limitations, until it was supposed that, under the decision in the case of Wheeling v. Campbell, 12 W. Va. 36, as followed in the cases of Forsyth v. Wheeling, 19 W. Va. 318, and Teass v. St. Albans, 38 W. Va. 1, the public easement therein was barred, and could not be regained except by recourse to the right of eminent domain. The original occupation not being adverse, it could not become so until the defendant had positive notice that the plaintiff was going to set up a claim of title perfected by adverse possession: Hutson v. Putney, 14 W. Va. 561; Parkersburg Industrial Co. v. Schultz, 43 546 W. Va. 470; Creekmur v. Creekmur, 75 Va. 430; 1 Am. & Eng. Ency. of Law, 2d ed., 798. If the plaintiff had at any time during his long possession given the defendant notice that he intended to hold the land adversely, there is no doubt he would at once have been dispossessed, and no lapse of time, and no possession of a portion of a street not required by the present necessities of the public, could raise the presumption of such notice; for the reason that there is nothing inconsistent with a public easement for the authorities to allow an abutting land owner the temporary occupation of a public highway not demanded for the present use of the public. It requires great labor and expense to grade, curb, and pave the streets of a town, and it is never done until the exigencies of the town demand it, and unused streets are allowed to lie idle until such requirement, and in

the meantime there is no good reason why abutting lot owners may not use unoccupied portions of such street for private purposes, so long as such use does not interfere with, but is entirely subordinate to, the public use thereof. Such has long been the custom, and would continue so, to the benefit of individuals and without hurt to the public, were it not for the baneful effect of the conclusion arrived at by this court in the case of *Wheeling v. Campbell*, 12 W. Va. 36.

The question of dedication and acceptance is hardly worthy of consideration, from the fact that plaintiff is not the original owner of the land, but claims under a deed and plat by which such street was dedicated to the public, and, it being inconsistent with his title papers, he is estopped from denying such dedication. Such dedication was not an act of his, but was long prior to his deed, which recognized and adopted the same. The same may be said of the acceptance by the defendant. It was perfect before his title accrued in subordination thereto: *Jarvis v. Grafton*, 44 W. Va. 453; *Taylor v. Philippi*, 35 W. Va. 554; *Riddle v. Charlestown*, 43 W. Va. 796; *Taylor v. Commonwealth*, 29 Gratt. 780; *Depriest v. Jones* (Va., 1895), 21 S. E. Rep. 478; *Buntin v. Danville*, 93 Va. 200, 9 Am. & Eng. Ency. of Law, 2d ed., 46.

Although, on the question of adverse possession, plaintiff has failed to make out his title, yet as this question is of such general importance, and has been so ably and exhaustively⁵⁴⁷ argued by the attorneys of both parties, the court would be derelict in its duty not to squarely meet the issues raised, and fearlessly settle them for the public good. The point is at once presented whether the law justifies the court in reviewing, disapproving, or modifying the doctrines enunciated, and conclusion reached, in the case of *Wheeling v. Campbell*, 12 W. Va. 36, followed in the cases of *Forsyth v. Wheeling*, 19 W. Va. 318, and *Teass v. St. Albans*, 38 W. Va. 1; and recognized in the case of *Taylor v. Philippi*, 33 W. Va. 554, and *Jarvis v. Grafton*, 44 W. Va. 453, all heretofore cited.

The case of *Wheeling v. Campbell*, 12 W. Va. 36, while ably considered in following the supposed weight of authority, is a plain and palpable misapplication of the statute of limitations to the sovereign rights of the people. That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals by express statutory provision there can be

no question; but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained. In the case of *Levassar v. Washburn*, 11 Gratt. 576, quoted and approved by Judge Johnson in the case of *Wheeling v. Campbell*, 12 W. Va. 36, Judge Lee says: "It is a maxim of great antiquity in the English law that no time runs against the crown, or, as is expressed in the early law writers, 'Nullum tempus occurrit regi.' The reason sometimes assigned why no laches shall be imputed to the king is that he is continually busied for the public good, and has no leisure to assert his rights within the period limited to his subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally, if not more, cogent, in a representative government, where the power of the people is delegated to others, and must be exercised by these, if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country, when they succeeded to the rights of the king of Great Britain, and formed independent governments in their respective states. And, though it has sometimes been called a prerogative right, it is, in fact, nothing more than an exception or reservation introduced for the public benefit, ⁵⁴⁸ and equally applicable to all governments." The constitution of this state clearly shows in whom all sovereign rights reside. Section 2 of article 2 declares: "The powers of government reside in all of the citizens of the state and can be rightfully exercised only in accordance with their will and appointment." Section 2 of article 3 declares: "All power is vested in and consequently derived from the people. Magistrates are their trustees and servants and at all times amenable to them." The people, in their collective capacity, are sovereign. To them all so-called "prerogative rights" belong, and from them they cannot be taken, or in anywise diminished except in accordance with their own appointment. This state has no so-called "crown lands" or public domain, except its public highways, including roads, streets, alleys, and other thoroughfares devoted to the use of the general public, and also probably a few public squares and buildings. There are no parks which belong exclusively to the general public. State lands are only held temporarily, until they can pass into the hands of private individuals, who will pay the taxes there-

on. So that we can well say that its highways are the only property the people of West Virginia hold in their sovereign capacity, and in these every individual has the same right, from the least to the greatest, and from which no one, however weak or small or mean, can be excluded. These are dedicated to the public business of the country, to its traffic and commercial interests, and without which the same could not thrive, if even exist. They are the pathways of communication from house to house, town to town, city to city. They are absolute necessities for the happiness, comfort, and well-being of the people. The man who would destroy them, if he could, is an enemy to the community, fit only "for treason, stratagem, and spoils." It matters not whether they be in the town or country, the same protecting egis watches over them, and this is the sovereignty of the people. The public do not hold the title in fee. It may be in the original owner, the abutting lot owners, the municipality, or state, and there it rests in abeyance as long as the land is needed by the public, who hold only an easement therein. This easement is more potent because of its sovereign character, and while it exists entirely suspends the title, or renders it temporarily ⁵⁴⁹ nonexistent, for no man dare assert it. The word "state" is generally used to denote three different things, and often without discrimination: 1. The territory within its jurisdiction; 2. The government or governmental agencies appointed to carry out the will of the people; and 3. The people in their sovereign capacity. The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So, statutes of limitations, which are made to apply to the state, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits on bonds, contracts, evidences of debt, or for torts—all these, though the state is a party, are subject to bar. As to all such things there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use the public highways, and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever, except according to the express will of the people. It would be a

strange thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other. The former is said to be an attribute of sovereignty, and why not the latter? Some law writers, at least, estimate that the state, as representative of the people, may both take, hold, and control property for public use, under the right of eminent domain, "as the public safety, necessity, convenience, or welfare demand": Cooley's Constitutional Limitations, 524. Others limit the meaning of "eminent domain" in its application to the appropriation by a sovereign state of private property for particular uses, for the benefit of the public. "All other exercises of power over private property, and every species of right in, and control and regulation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the state": Lewis on Eminent Domain, sec. 550 2. This author refers the holding of property to the sovereign right of proprietorship for the public good. In all cases where the sovereign rights of the state are referred to, the state is spoken of as representative of the people, and not of the territory or the government, or its agencies. The state, in its governmental capacity, has no right to alien, or authorize the alienation, of the public highways, except for the public good; but it may provide subagencies to control, make, repair, and otherwise exercise complete supervision over such highways, and make such agencies responsible for the good condition thereof, through their servants. Such it has done by turning the roads, streets, alleys, and other thoroughfares over to the counties, district, and municipalities, being the political divisions in which they are respectively located, and has authorized such agencies to close, vacate, change, alter, or discontinue any of them no longer of benefit to the public. But such agencies have no right to sell, alien, or dispose of such highways in any manner, except as provided by statute. Nor can any individual destroy the public easement in such highway by any act of his own. It is a new quality given to land, when dedicated to the use of the public as a highway. And it is one that an individual can neither acquire nor enjoy by himself. When land ceases to be a highway, this quality no longer attaches to it, but it is utterly destroyed or becomes

extinct. It belongs to the public, and not to the state, county, or municipality that may in their governmental capacities, under their police and administrative powers, regulate and control it in such manner as will conduce to the public welfare, and may destroy it if in accord with the sovereign will of the people, but not otherwise. If the easement is destroyed by the proper agency of the people, the title is revived, and the land reverts to the owner of the fee, whether it be the municipality, the abutting owners, or the original owner who first dedicated it to public use. If the easement is interfered with by an individual while it is alive, such interference is a public nuisance, and it matters not how long it is continued, it can never destroy the easement; for it is under the ban of the law, and subject to abatement at any time. A nuisance can never oust a public easement, no more than an individual can take away the sovereignty of the people. He may forfeit ⁵⁵¹ his property and rights to them, but they can never, in a popular government, forfeit their sovereignty to him. He may cease to be a part thereof, but cannot enjoy more than his equal share therein. His nuisance must yield to their sovereignty, whenever they see fit, through their proper agencies, to exercise it. Once a nuisance, always a nuisance; once a highway, always a highway, until legally discontinued, changed, or altered: *Norfolk City v. Chamberlaine*, 29 Gratt. 534; *Taylor v. Commonwealth*, 29 Gratt. 780; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860; *Depriest v. Jones* (Va., 1895), 21 S. E. Rep. 478; *Buntin v. Danville*, 93 Va. 200; *Board of Supervisors v. Lincoln*, 81 Ill. 156; *Driggs v. Phillips*, 103 N. Y. 77; *Vicksburg v. Marshall*, 59 Miss. 563; *Rae v. Miller*, 99 Iowa, 650; *Wolfe v. Pearson*, 114 N. C. 621; *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752; *Williams v. St. Louis*, 120 Mo. 403; *Ulman v. Charles Street Ave. Co.*, 83 Md. 130; *Coleman v. Thurmond*, 56 Tex. 514; *Webb v. Demopolis*, 95 Ala. 116; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303; *Wolfe v. Sullivan*, 133 Ind. 331; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Elliott on Roads and Streets*, 668.

The reason given by Judge Johnson why the maxim of "nullum tempus," etc., cannot apply to municipalities, is "that it only applies to sovereignty, and the sovereign cannot transmit it to persons or corporations. A municipal corporation cannot claim exemption under it, any more than a natural person, although it may hold property in trust for the public."

In short, that if a sovereign intrusts his property to a trustee to take care of for him, when one of his subjects presents himself and wrongfully proposes to appropriate the sovereign's property to his own use, the trustee cannot defend it as the property of the sovereign, but must let it go. So it may be said of the county, so it may be said of the state, and every public officer or agency; for they are all merely trustees and servants of the people. And, if such trustees are powerless to protect the rights of the sovereign people, then such sovereign has no rights that can be protected from individual encroachment, for the reason that the sovereignty of the people must be asserted through such governmental ⁵⁵² agencies or not asserted at all. Judge Johnson invests the state with sovereignty which belongs alone to the people, and of which the state is the mere trustee, except when the word is used in a broad sense, to designate the people, and not governmental agencies. The people have the power to impose the duty of protecting their sovereign rights on any public agency or individual officer or person they may see fit and proper, and the fact that they do impose such duty on trustees or agents cannot possibly destroy such rights without their consent. And it is the duty of every man, woman, and child in this state who enjoys the protection of the laws of the land, including the use of its highways, to aid in preserving such public sovereign rights intact, instead of seeking to overthrow and destroy them. The king of England intrusted his highways to supervisors and local authorities, yet it never entered even the imagination of his subjects that by reason thereof they could acquire rights against him in his highways by means of nuisances maintained therein for any length of time. The people of this country succeeded to all his rights, and more than he are compelled to transact their business through local agencies, and there is no more reason that they, by so doing, should lose their rights than he. Their sovereignty is far more pervading than his, for it has representation of pure blood in every household throughout the length and breadth of their domain. The oversight in the learned judge's opinion, and the numerous decisions on which he places his reliance, is his failure to distinguish the municipality in its private, ministerial, and local governmental capacities from the municipality in its higher governmental capacity as the agent of the public, charged with the duty of preserving the sovereign rights of the people.

The municipality, though it may own the fee, is not the owner of the public easement in the land. This, as heretofore shown, belongs to the people, and cannot exist apart from them. This the municipality cannot alien or dispose of in any manner except in accordance with the express will of the people, for their benefit. The statute of limitations, as relied on by the plaintiff, is not to bar any right the municipality has in the street, but to destroy the public easement. It is not a plea ⁵⁵³ against their trustee, but a plea against the people in their sovereign capacity. If sustained, it does not oust the municipality, for its governmental control thereover still remains, but it ousts the people, even taking away their own right to use the street as a public highway. The same argument would deprive the people of any highways in the state if its governmental agencies are only neglectful of their duties, for all their highways are intrusted to local agencies. The doctrine of "nulle tempus," etc., must apply to the rights of the people as the sovereign, it matters not what agency is intrusted with their care, or it must be altogether discarded in a popular form of government. And the people must be known as the uncrowned king, without a kingdom. Such sovereignty would be as helpless as Gulliver when staked to the ground by Lilliputians with hairs from his own head. The argument that municipalities should be specially diligent in looking after the rights of the people, or the people should suffer the loss thereof, is applicable to any public agency as well as municipalities, in England, as well as in America, and it was the want of such diligence, and the negligence of such agencies, that furnished the most reasonable foundation for the doctrine "nullum tempus," etc. To repeat Judge Lee's language: "A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers." It does not matter whether such officers belong to a municipality, district, or a county, they are all public officers, so far as the public highways are concerned, and their negligence has the same disastrous effect on the public: *Charleston v. Geller*, 45 W. Va. 44. The only logical conclusion that can possibly be reached is that the public easement in all the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith, by private interests, is a continuing public nuisance, subject to abatement whenever the growing necessities of the

people require such easement for the uses to which the land to which it attaches was originally dedicated: *O'Connor v. Pittsburgh*, 18 Pa. St. 187. This conclusion, though adverse to *Wheeling v. Campbell*, 12 W. Va. 36, is sustained by a vast and increasing ⁵⁵⁴ weight of authority, including England, Canada, the United States, the states of Alabama, California, Colorado, Indiana, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New York, New Hampshire, North Carolina, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, Wisconsin, and Virginia. Many of the authorities have been heretofore cited: See, also, 1 Am. & Eng. Ency. of Law, 2d ed., 878-880, where the authorities pro and con are collected. Whenever a decision of this court is found, on careful consideration, to be illogical, opposed to public policy, and subversive of the supreme law of the land, the public welfare, and the sovereignty of the people, and, while not a nuisance per se, is the bulwark of nuisances and defense of unconscionable private demands, the source of continual local strife and litigation, and destructive of the peace of whole communities, it is the solemn duty of this court to disapprove it and end its evil influences: *Lieber's Hermeneutics*, 208; 23 Am. & Eng. Ency. of Law, 36; *Mayer v. Frobe*, 40 W. Va. 246-262. The decision in the case of *Wheeling v. Campbell*, 12 W. Va. 36, instead of being a matter of repose, appealing, as it does, to the cupidity of human nature, has opened wide the door to numerous encroachments on the rights of the people by those whose selfish covetousness blind their eyes to the greater obligation they owe to the sovereign power in this land, which secures to them the blessings of liberty protected by law. Every law-abiding citizen, who loves, respects, and cherishes the institutions of his country, is charged with the patriotic duty, through fealty to the people, to preserve all public rights intact. If there are those whose sentiment to public obligation is so weak as to cause them, through their promptings of private gain, to become exploiters of public rights, they should find no countenance in the decisions of the courts. The law can never be made the instrument of its own destruction in the hands of lawbreakers, nor should it afford protection where allegiance is wanting. The doctrine of *stare decisis* cannot be invoked to perpetuate public nuisances or destroy the sovereignty and welfare of the people. The cases of *Wheeling v.*

Campbell, 12 W. Va. 36, Forsyth v. Wheeling, 19 W. Va. 318, and Teass v. St. Albans, 38 W. Va. 1, in so far as they hold that public easements ⁵⁵⁵ in the public highways can be destroyed by private individuals contrary to the sovereign will of the people, are hereby disapproved as erroneously propounding the law.

Nor does the doctrine of estoppel apply in such cases: Roper v. McWhorter, 77 Va. 214, 222; 1 Dillon on Municipal Corporations, secs. 96, 381, 749; Green's Brice's Ultra Vires, 42, 597; Mayor v. Ray, 19 Wall. 468; Williamson v. Jones, 43 W. Va. 562, 574, 64 Am. St. Rep. 891; Webb v. Demopolis, 95 Ala. 116; 1 Am. & Eng. Ency. of Law, 882. The statute of limitations is a mere legal estoppel, and, if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a lawbreaker or wrongdoer. Clean hands and a clear title are always equitable requirements: Bell v. Burlington, 68 Iowa, 296; Cheek v. Aurora, 92 Ind. 107. In 2 Dillon on Municipal Corporations, fourth edition, section 675, it is said: "Such a corporation does not own, and cannot alien, public streets or places, and no mere laches on its part, or on that of its officers, can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than those of the public. . . . The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by mere lapse of time, but upon all the circumstances of the case, to hold the public estoppel or not, as right and justice may require." In this the rights of the people are confounded with the rights of the municipality. How can equitable estoppel, any more than the statute of limitations, deprive a sovereign of his rights, and permit his subjects to destroy them by their wrongful conduct? The use of their highways is a sovereign right, common to all the people, and of which they cannot be divested, except in accordance with their will and appointment for the public weal. The law is best enunciated in the case of Webb v. Demopolis, 95 Ala. 116, where it is held that "a city or town has no alienable interest in the ⁵⁵⁶ public streets there-

of, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of a city to maintain a suit in equity to remove the obstruction." The words, "holds them in trust," are objectionable; for the reason that the people generally hold them and own the public easement, and the municipality merely has authority to supervise and keep them in repair and free from obstructions for the benefit of the whole people and the stranger within their gates. There may arise cases of particular hardship where, through the negligence or mistake of the public officers, valuable permanent improvements, under a bona fide claim of right, may be erected by the abutting lot owners, invading and destroying, without wrongful intent, the public easement in a portion of the adjacent street. Such mistakes are often occasioned by different surveyors, with different instruments. Such invasion is sometimes slight in comparison with the improvements made, and at other times it is much more serious, not only destroying the public easement, but interfering with the regularity and symmetry of the street. To abate such structures as an ordinary nuisance would be a tyrannical act of governmental power, which finds no lodgment in the breasts of a free and just people. The mistake having been mutual or occasioned by the negligence of the public, and the property owner being free from evil intent, the loss should fall on the people, as most able to bear it, rather than on the individual, who may be rendered bankrupt if he must endure it. Such cases are provided for in section 9, article 3, of the constitution in these words: "Private property shall not be taken or damaged for public use without just compensation." This is a limitation put on the sovereignty of the people by the sovereign itself. It is intended for the public good, and to prevent oppression and injustice. Whenever private property is taken or damaged for public use, it must be done through the public officers, acting as the agents of the people. And for these same officers to mislead, either by acts of omission or commission, a private person into building a costly structure over the line of a ⁵⁵⁷ public highway, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, would be taking

and damaging private property for public use without just compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, in so far as the intrusive structure is concerned. The land need not be condemned, but the damage to the structure, by the removal thereof, should be paid. Such exception does not apply to one who knowingly invades a highway. He must bear the loss occasioned thereby, and not the public. It is his own injury, and he must endure it alone. In the present case, the plaintiff, fully informed by his title papers of his rights, willfully invaded the street. In the case of *Spencer v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 406, Judge Green, on page 422, intimates that the abutting lot owner's title extends to the middle of the highway. If such be the law, the title to the land in controversy is in plaintiff, subordinate, however, to the public easement; and, so long as he did not interfere with the public, he had the right to use his land for his private purposes, but, as soon as the necessities of the public required, he should have yielded it without controversy. This would have been in accord with his higher duty to the public, and would have showed that, in occupying the land, he was not actuated with any unlawful motive. But when he refused to surrender his possession, on demand of the proper legal authorities, he became guilty of maintaining a public nuisance, subject to abatement, either by the municipal authorities, under their statutory powers, or by an appeal to a court of equity. This cause having been instituted in a court of equity, it will not be dismissed without doing complete justice between the parties: *Hotchkiss v. Fitzgerald etc. Plaster Co.*, 41 W. Va. 367. The decree complained of is reversed, and this cause is remanded to the circuit court, with direction that the plaintiff's injunction be dissolved, and that a mandatory injunction be awarded the defendant, at the plaintiff's costs, directing the plaintiff to abate the nuisance maintained by him thereon, and that the strip of ground in controversy be restored to Water street, and made subject to the public easement therein, and to be further disposed of according to the principles of equity.

DEDICATION—ESTOPPEL.—Privies in estate are bound to the same extent as grantors by deeds and acts under them, and it is not within the power of either to resume a grant to the public after the public have entered upon the use designed: *Warren v.*

Jacksonville, 15 Ill. 236, 58 Am. Dec. 610. See, also, Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, and the monographic note to Whitesides v. Green, 57 Am. St. Rep. 749-757.

THE STATUTE OF LIMITATIONS RUNS AGAINST MUNICIPAL CORPORATIONS, such as cities, towns, or counties, except as to property devoted to a public use or held upon a public trust, and contracts of a public nature: Bedford v. Willard, 133 Ind. 562, 36 Am. St. Rep. 563.

ADVERSE POSSESSION OF A PUBLIC STREET or alley in a city for the statutory period cannot confer title, but when such possession is accompanied by other circumstances which would render it inequitable that the public should assert its rights to regain possession, it may be estopped to do so: Crocker v. Collins, 37 S. C. 327, 34 Am. St. Rep. 752. But see monographic note to Schneider v. Hutchinson, ante, pp. 492-495.

ADVERSE POSSESSION OF PUBLIC HIGHWAYS or streets cannot confer title. Public rights are not destroyed by long-continued encroachments or permissive trespasses: Commonwealth v. Moorehead, 118 Pa. St. 344, 4 Am. St. Rep. 599. See, further, the notes to Orr v. O'Brien, 14 Am. St. Rep. 278-282; Schneider v. Hutchinson, ante, pp. 492-495.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

MAACK v. PRANG.

[104 WISCONSIN, 1.]

DURESS.—THREATS TO PROSECUTE a man for embezzlement unless his wife executes a mortgage on her separate property to secure his debt constitute duress and avoids her mortgage obtained thereby.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.—A guardian is a bona fide holder of an unmatured note and mortgage taken from a former joint guardian to pay an indebtedness to the ward for property which such former guardian has had and failed to account for at the time of resigning as guardian.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.—A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder.

NEGOTIABLE INSTRUMENTS—DURESS AS DEFENSE.—The defense of duress to negotiable paper is cut off by its transfer to a bona fide purchaser before maturity.

Miller, Noyes, Miller & Wahl, for the appellant.

Sylvester, Scheiber & Orth, for the respondent.

4 WINSLOW, J. It is admitted that this was a mortgage given by the wife upon her own property to secure the debt of her husband, but it is claimed by the appellant that there was not sufficient evidence to establish the defense of duress. We cannot agree with this contention. The defendant William had been for several years a traveling salesman for Herman S. Mack, the original mortgagee, and was short in his accounts to the amount of five thousand dollars. The evidence of both Marie and William Prang was to the effect that both Mack and his bookkeeper personally came to see Mrs. Prang,

and threatened to prosecute William for embezzlement, and sent him to jail, unless she would give the mortgage; that she at first refused, and that they gave her a day or two to think the matter over; that she was greatly excited and alarmed at these threats, and had fainting spells both before and after she executed the mortgage, and that she only executed it to prevent her husband being sent to jail. It is true this testimony was substantially contradicted by Mack and the book-keeper, but we cannot say that the findings on this point were against the weight of the evidence. Facts substantially similar to these have frequently been held to constitute duress ⁵ which renders voidable a security or contract executed under their influence: McCormick etc. Co. v. Hamilton, 73 Wis. 486; City Nat. Bank v. Kusworm, 88 Wis. 188, 43 Am. St. Rep. 880, and cases cited in opinion. It is true that the will of the person making the contract must be overcome so that the act is not his voluntary act, but that fact is found in the present case, and upon evidence which we think sufficient. Nor is this doctrine in any way in conflict with what was said by this court in Wolff v. Bluhm, 95 Wis. 257, 60 Am. St. Rep. 115. That was a case, as distinctly stated in the opinion, where the evidence showed that the will was not overcome, and the party acting under the alleged duress was free to act as he chose, and only acted after consulting his friends and neighbors. It was also there said that in order to constitute duress "the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition."

The fact of duress being found upon sufficient evidence, two further questions require consideration, namely, Was the plaintiff a bona fide holder? and, If so, does such fact cut off the defense of duress?

The court below found that the plaintiff was a bona fide holder before due, and this was plainly correct. The facts were these: Herman Mack and Bertha Mack, the plaintiff, were joint guardians of Alma Mack, an infant. Herman received ten thousand dollars of the property of Alma, and in December, 1894, was in failing circumstances and unable to account for it. Thereupon he resigned his guardianship, which resignation was accepted by the county court, leaving Bertha sole

guardian. After resigning, he turned over this note and mortgage to Bertha, who received it in payment pro tanto, at its face value, upon Herman's indebtedness to his ward. It had not matured when thus sold to Bertha. No reason is perceived why the remaining guardian might not ^a receive the mortgage in payment of the former guardian's liability to the ward—at least, to the amount of its actual value. A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder: *Shufeldt v. Pease*, 16 Wis. 659 [689]; *Kellogg v. Fancher*, 23 Wis. 21, 99 Am. Dec. 96.

There is some conflict in the authorities upon the question whether the defense of duress by threats can be successfully urged against a bona fide holder for value of negotiable paper, but the better opinion and weight of authority is that such defense stands upon the same footing as other defenses which may be made as between the original parties but are cut off when the paper reaches the hands of a bona fide holder: *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446; *Farmers' etc. Bank v. Butler*, 48 Mich. 192; *Clark v. Pease*, 41 N. H. 414; *Beals v. Neddo*, 1 McCrary, 206; *Martineau v. McCollum*, 3 Pinn. 455; 4 Am. & Eng. Ency. of Law, 2d ed., 334. Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void: *City Nat. Bank v. Kusworm*, 91 Wis. 166. If it be simply a voidable contract, then it follows naturally that, when the contract consists of negotiable paper, the defense is cut off by transfer to a bona fide purchaser before maturity in the same manner that other defenses upon the ground of fraud are cut off. The conclusion is that the plaintiff was entitled to a judgment of foreclosure notwithstanding the duress.

By the Court. Judgment reversed, and action remanded with directions to enter the usual judgment of foreclosure and sale.

A motion for a rehearing was denied September 26, 1899.

IN THE CASE of *Behl v. Schuett*, 104 Wis. 76, it was held that if the arrest of the defendant was secured and an action for malicious prosecution brought in bad faith and to coerce a settlement, regardless of the fact whether a cause of action existed or not, a settlement so induced was vitiated by duress, and might be avoided on that ground. In the case of *Keller v. Schmidt*, 104 Wis. 596, it was decided, on the authority of the principal case, that

the defense that a negotiable note was obtained by duress was not available against a bona fide purchaser of such note for value before maturity.

In *Galusha v. Sherman*, 105 Wis. 263, Mr. Justice Marshall, who delivered the opinion of the court, stated the following propositions of law: "A settlement, free from mutual mistake of fact, or mistake upon one side and fraud upon the other, is binding between the parties thereto without regard to which gets the best of the bargain, or whether all the gain be in fact on one side and all the sacrifice on the other, but if, in making a contract, one party to the transaction is incapable of exercising his free will by reason of threats made by the other for the purpose of producing such condition, to the end that he may obtain such contract, such party may, at his option, repudiate the contract on the ground of duress. . . . What constitutes duress is a matter of law. Whether duress existed in a particular transaction is a matter of fact. There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? It is not necessary to produce duress by threats that there must be such threats as are reasonably necessary to control by fear the free will of a person of ordinary firmness and courage. . . . The true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetency to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him."

DURESS.—A HUSBAND OR WIFE may avoid a contract induced and obtained by threats to imprison the other: *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 15 Am. St. Rep. 447. A deed from a wife, secured through threats of a criminal prosecution of her husband for embezzlement, is voidable: *Miller v. Minor Lumber Co.*, 98 Mich. 163, 39 Am. St. Rep. 524; and if a husband, acting as the agent of a mortgagee, compels his wife by threats and intimidation to execute a mortgage of her property to secure his debt, the mortgage may be avoided: *Note to Central Bank v. Copeland*, 81 Am. Dec. 602.

NEGOTIABLE INSTRUMENTS.—THE DEFENSE OF DURESS is not, as a general rule, available in an action upon a promissory note given to prevent the prosecution of another person not the maker's husband or wife: *City Nat. Bank v. Kusworm*, 88 Wis. 188, 43 Am. St. Rep. 880.

PROMISSORY NOTE—BONA FIDE HOLDER.—One who takes a note before maturity in payment of an antecedent debt is a bona fide purchaser: *Fitzgerald v. Barker*, 96 Mo. 661, 9 Am. St. Rep. 375; *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632. See, too, *Lookout Bank v. Aull*, 93 Tenn. 645, 42 Am. St. Rep. 934.

WILLEY v. HODGE.

[104 WISCONSIN, 81.]

EQUITY—REFORMATION OF VOLUNTARY CONVEYANCE.—A voluntary conveyance of land by a father to his adult son, founded on natural love and affection, and made without any prior consultation or agreement with the grantee, as a testamentary disposition of the property, cannot, after the death of the grantor and as against other heirs, be reformed in equity and made to describe the land which the grantor intended but by mistake failed to convey.

T. L. Cleary, for the appellant.

Lowry & Clementson, for the respondent.

⁸⁴ BARDEEN, J. Following in line with the decision of the court below, the view we have taken of this case renders it unnecessary to determine whether, under the testimony, there has been a legal delivery of the deed under which plaintiff claims. Upon that question we express no opinion.

The deed in question was not made pursuant to any agreement or contract of settlement. It was a purely voluntary conveyance, founded upon natural love and affection, and was made without any prior consultation or agreement with the grantee. A family settlement is an agreement made between a father and his son or children, or between brothers, to dispose of property in a different manner from that which would otherwise take place: 12 Am. & Eng. Ency. of Law, 2d ed., 875; *Baker v. Pyatt*, 108 Ind. 61. It being considered that the transaction in question does not possess the essential elements of a family settlement, it is quite evident that the law regarding such settlements can have no application to this case. It is true, as argued by the appellant, ⁸⁵ that equity will sometimes interfere in such cases, and correct errors and enforce contracts, where the transaction is founded only upon a meritorious consideration. Cases illustrating this principle may be found in the notes to 12 American & English Encyclo-

pedia of Law, second edition, 877. But, in speaking of the disposition of a court of equity to interfere in cases of a voluntary contract, Judge Story says: "It has been said that there are exceptions, and that they stand upon special grounds, such as the interference of courts of equity in favor of settlements upon a wife and children for whom the party is under a natural and moral obligation to provide. But although the doctrine in favor of such exceptions has been maintained by highly respectable authority, yet it must now be deemed entirely overthrown by the weight of more recent adjudications in which it has been declared that the court will not execute a voluntary contract, and that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement": 1 Story's Equity Jurisprudence, sec. 433. See 2 Story's Equity Jurisprudence, 13th ed., sec. 793b.

Nor can we apply to this case the same doctrine of equity jurisprudence as is applied to the defective execution of powers. Quoting again from 2 Story's Equity Jurisprudence, section 793b: "There may be a clear, if not a satisfactory, line of distinction drawn between cases of voluntary contracts, covenants, and settlements, where there has been a defective conveyance or execution thereof, and cases of a defective execution of a power. In the latter cases the donee of the power designs to carry into effect, not merely his own objects and interests, but those of other persons, by executing the power in favor of persons who stand as volunteers upon a meritorious consideration, and for whom he is under a natural and moral obligation to provide; and his own defective execution of the power, by mistake or otherwise, not only defeats his own positive intention and moral obligation and duty to execute ⁸⁶ the trust reposed in him, but it would, if not aided, also defeat the the very objects for which the power was created by third persons, whether it was created as a bounty, or upon a valuable consideration passing between the donor and donee of the power." No such considerations exist in this case, and the freedom of equity intervention in cases of defective execution of powers cannot be invoked to aid the plaintiff in his dilemma. There can be no doubt of the intention of the father to convey this tract of land to the plaintiff. His deed, however, fails to describe it. The rule is quite familiar that a defective deed may be treated in equity as an agreement to convey, and performance enforced. But the rule is equally well understood

that, when it appears that the deed was voluntary, equity will not carry it into effect or reform it: *Eaton v. Eaton*, 15 Wis. 259 [284]; *Hanson v. Michelson*, 19 Wis. 498 [525]; *Petesich v. Hambach*, 48 Wis. 443.

It is suggested that, as the deed in question is based upon what is called in the books a "meritorious consideration," the right to a reformation ought to be upheld. All the cases I have been able to find in which such a consideration has been upheld as warranting the intervention of a court of equity rest upon the fact of the defective execution of a power, or upon some matter of contract, such as an agreement for a family settlement, or the result of negotiation and agreement. These elements are entirely wanting in this case. The grantee in the deed knew nothing of its execution until after the father's death. The son was an adult person in no way dependent upon the bounty of the parent. He has no claim upon his father at all, superior to his sisters, against whom he seeks relief. While recognizing the principle that in certain cases the performance of a moral duty will justify the intervention of equity, Pomeroy, in his work on Equity Jurisprudence, says that it is only effective within very narrow limits, and will only "enforce the promise thus imperfectly performed, as against a third person claiming ⁸⁷ merely by operation of law, who has no equally meritorious foundation for his claim": Pomeroy's Equity Jurisprudence, sec. 588. No case has been found that carries the rule to the limit sought in this case. On the contrary, modern decisions are the other way. Story's Equity Jurisprudence, section 987, repeats the doctrine before quoted, and says the court will not interfere, although the parties stand in the relation of wife or child. A recent case in Michigan, cited by the trial court, fully sustains his conclusions: *Shears v. Westover*, 110 Mich. 505.

The transaction under consideration was, in a general sense, a testamentary disposition of property. The doctrine being established in this state that equity will not reform a will, the plaintiff is left without remedy: *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757.

By the Court. Judgment of the circuit court is affirmed.

REFORMATION. — DEFECTIVE VOLUNTARY CONVEYANCES will not be perfected in equity: Note to *Powell v. Morisey*, 2 Am. St. Rep. 346. But see the extended note to *Williams v. Hamilton*, 65 Am. St. Rep. 514, 521, on reformation of instruments.

WILLS CANNOT BE REFORMED so as to make them conform to the intention of the testator, though a mistake in the description of land devised may, in some instances, be corrected in equity: See the extended notes to *Williams v. Hamilton*, 65 Am. St. Rep. 521, 522; *Goode v. Goode*, 66 Am. Dec. 633-637.

HUBBARD v. CHICAGO & NORTHWESTERN RY. CO.

[104 WISCONSIN, 160.]

NEGLIGENCE CAUSING DEATH—ACTION FOR.—The right of action given by the statute providing that if the death of a person is caused by the negligence of another the latter may be held liable in an action brought by and in the name of the personal representatives of the deceased, and that the amount recovered shall belong to his lineal descendants, constitutes no part of the estate of the deceased and is not taken away by the final settlement of such estate, or the failure or refusal of the administrator to commence suit before such final settlement.

EXECUTORS AND ADMINISTRATORS—NOTICE TO MINOR HEIRS—GUARDIAN AD LITEM.—The appointment of an administrator de bonis non of an intestate estate, without notice to or the appointment of a guardian ad litem for minor heirs is void, though the appointment of such administrator is made through the application of their general guardian, and a subsequent order of court allowing a guardian ad litem to file an appearance on behalf of such minors nunc pro tunc does not validate the appointment.

ESTATES—GUARDIAN AD LITEM.—The functions of a guardian ad litem appointed to represent minor heirs in the general administration of an intestate's estate terminate with the final settlement of such estate, unless continued by order of court.

G. G. & C. H. Sedgwick and J. A. Schmitz, for the appellant.

Fish, Cary, Upham & Black and E. M. Hyzer, for the respondent.

161 CASSODAY, C. J. This action was commenced September 28, 1897, by the service of a summons. The complaint alleges, in effect, that the plaintiff's intestate was killed instantly, by the gross negligence of the defendant, October 3, 1895; that he left five minor children, whose ages ranged from nine to nineteen years, but no widow; and that the plaintiff was appointed such administrator September 28, 1897.

The defendant answered by way of plea in abatement to the effect that the deceased left, him surviving, five minor

children, but no widow, as stated; that upon the petition of the brother of the deceased to the county court, filed October 8, 1895, and after due notice thereof, and upon proper hearing thereon, and after the proper appointment of G. G. Sedgwick as guardian ad litem of the minor children of the ¹⁶² deceased, C. J. Gilbert was, by an order of the county court, duly appointed administrator of the estate of the deceased, November 5, 1895; that upon the same day he filed his proper bond, and letters of administration were to him duly issued; that thereafter C. J. Gilbert duly administered that estate, and filed his final account of such administration and his petition for its examination and allowance November 25, 1896, and that December 29, 1896, the county court made and filed its findings of fact and conclusions of law, whereby, among other things, such final account was examined and allowed, and it was ordered that, upon the filing of certain receipts therein mentioned, said administrator should be finally and forever discharged from his trust and from all liability on account thereof, and that judgment in accordance with such findings and conclusions should be entered; that September 27, 1897, the county court made and filed its order reciting such facts, and entered such order or judgment forever discharging Gilbert as such administrator from such trust and from all liability on account thereof; that September 25, 1897, one Loten, who had been appointed general guardian for such infants August 22, 1896, resigned such guardianship, and Albert L. Hougen was appointed such general guardian in his place, and that such appointment was made without legal notice thereof, and without the necessary petition and consent thereto by or on behalf of such infants; that September 28, 1897, an unverified petition was made and filed by said Hougen, alleging that said estate had not been fully administered, and that there still remained uncollected, as an asset of the estate, a claim against the defendant herein, valued at one thousand dollars, for negligently causing such death, and praying for the appointment of Harvey F. Hubbard as administrator de bonis non of such estate; that upon the same day the county court made its order appointing Hubbard to be administrator de bonis non, and authorized and directed him to bring this action; that Hubbard ¹⁶³ thereupon filed his bond, and letters of administration were in form granted to him upon the same day, but that no notice whatever of the time and place of hearing and action upon such petition of Hougen was given, by

publication or otherwise, to any of the parties interested therein; that such order was made wholly without jurisdiction or authority; that the plaintiff commenced this action on the same day, without any other or different appointment; that no guardian ad litem was ever appointed after such final settlement, September 27, 1897, except that February 19, 1899, the said Sedgwick, who had been duly appointed as the guardian ad litem of the minor children November 5, 1895, filed in the county court his verified statement to the effect that September 28, 1897, he appeared before the court as such guardian ad litem in behalf of such infants, and asked the court to appoint Hubbard as such administrator of the estate, and to enter an order thereon permitting his appearance formally nunc pro tunc as of September 28, 1897; that February 20, 1899, the county court ordered that such appearance be, and the same was thereby, directed to be filed in that court nunc pro tunc as of September 28, 1897.

The trial court found, in effect, that the facts were as so alleged in the plea in abatement; that no guardian ad litem was appointed by the county court upon the hearing of such petition September 28, 1897; that Sedgwick was attorney for the petitioner, and that no appearance was entered for or by any guardian ad litem on such hearing; that no notice of any kind was given, by service or publication, or in any other manner, of the hearing of said matter; that September 28, 1897, the plaintiff was appointed as such administrator, without notice. And as conclusions of law the court found, in effect, that such appointment was without authority, and invalid as to the minor children and as to this defendant; that the plaintiff in this action has not the capacity to bring the same as administrator of the estate of ¹⁶⁴ the deceased; that the plea in abatement was sustained; that this action should be dismissed; that the defendant was entitled to judgment dismissing this action and for its costs and disbursements; that judgment be entered in accordance with such findings and conclusions. From the judgment so entered the plaintiff appeals.

The complaint alleges that Andrew T. Weblin was instantly killed by the defendant's gross negligence. This being so, the defendant can only be held liable in an action "brought by and in the name of" his "personal representative," "and the amount recovered," if any, will "belong and be paid over to" his "lineal descendants"; that is to say, his children mentioned in the complaint: Stats. 1898, secs. 4255, 4256; Brown

v. Chicago etc. Ry. Co., 102 Wis. 137. The right of action, therefore, is purely statutory, and in this case is given solely for the benefit of such children: *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137. Such right of action so given for the benefit of the children constituted no part of Andrew T. Webber's estate, and hence the final settlement of that estate September 27, 1897, cannot operate as a bar to their right of action by and in the name of a personal representative appointed in the manner prescribed by statute. Of course, the action might have been brought by C. J. Gilbert, as the administrator of the intestate's estate, but his refusal or failure to bring the action did not take away the right thus given to the children to have such action prosecuted in the name of such personal representative. Our statutes are unlike the statutes of Michigan, and hence the decisions in that state, cited, are not applicable here.

The question recurs whether the appointment of the plaintiff as such administrator de bonis non is valid. The statute provides that: "When application shall be made to any county court for the appointment of an administrator on an intestate estate . . . such court shall appoint a time and place for hearing such application, and shall cause notice ¹⁶⁵ thereof to be given, by personal service on all persons interested, at least ten days before the day designated, or by publication in a newspaper as provided in section 4045, at least three weeks successively previous to the time appointed; and no general administrator shall be appointed without such notice": Stats. 1898, sec. 3808. As indicated, no such notice was given, by publication or otherwise. All parties interested were entitled to such notice and a hearing. At the time the plaintiff was so appointed administrator, at least four, if not all five, of such children were under age. They did not and could not waive their right to such notice and hearing, and no one at the time had authority to represent them or waive such right to notice and hearing for them. No guardian ad litem was appointed to represent such children in this action. Such an appointment was essential in order to bind the infant heirs: *O'Dell v. Rogers*, 44 Wis. 136. True, the application for the appointment of the plaintiff was made by their general guardian, appointed on the resignation of their former general guardian: Stats. 1898, sec. 3969. But he could not, as to such children or the defendant, waive the notice required by the section of the statute quoted: Stats. 1898, sec. 3808. True,

a guardian ad litem was appointed November 5, 1895, to represent the infants in the general administration of the estate; but his functions as such guardian ad litem terminated with the final settlement of that estate September 27, 1897: Stats. 1898, sec. 4052a; County Court Rule 3. His appointment might have been continued by order of the county court, but was not: Stats. 1898, sec. 4052a; County Court Rule 3. Had he been so continued by order, and appeared in the county court at the time of the plaintiff's appointment as administrator, then the county judge was required to make an entry in his minutes of such appearance, and proceed no further without such appearance being so entered: Stats. 1898, sec. 4052a. But there was no such appearance, and, of course, no such entry. The order of the county ¹⁶⁶ court made February 20, 1899—more than sixteen months after the commencement of this action—allowing Sedgwick, as such guardian ad litem, to appear nunc pro tunc as of September 28, 1897, when the plaintiff was so appointed administrator, is without significance. Certainly, it did not cure the want of notice required by section 3808 of the Statutes of 1898. Nor could it operate to give vitality to this action, which had been commenced sixteen months before without authority.

By the Court. The judgment of the circuit court is affirmed.

WRONGFUL DEATH.—DAMAGES FOR CAUSING the death of a person are recoverable for the benefit of his heirs, and do not constitute any part of his estate: *Munro v. Pacific etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. But see the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 676, 677.

ADMINISTRATORS.—PROPER NOTICE OF AN APPLICATION FOR LETTERS of administration must be given to bring the parties before the court in order to give it jurisdiction: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

ADMINISTRATORS DE BONIS NON are discussed in the monographic note to *Potts v. Smith*, 24 Am. Dec. 379-390.

GUARDIAN AD LITEM.—A PROBATE SALE of a ward's property upon a proper application and showing by the guardian is a proceeding in rem, in which the appointment of a guardian ad litem is not required or authorized: *Daughtry v. Thweatt*, 105 Ala. 615, 53 Am. St. Rep. 146.

GUNDERSON v. SWARTHOUT.

[104 WISCONSIN, 186.]

FIXTURES—ELECTRIC LIGHT PLANT.—A dynamo and appurtenant machinery leased to an electric light company by the manufacturer under a contract whereby the rental is to be applied to the purchase price of that or a larger dynamo which the company has an option to purchase within a certain time, kept in place by being screwed to timbers spiked to the floor of the company's building, moved from time to time, and operated by belts from shafting firmly attached to the floors of the building, after the execution of a mortgage, by the company on the premises, become fixtures, and pass to the purchaser under foreclosure of the mortgage after the expiration of the option.

FIXTURES.—MACHINERY attached to and adapted to the purpose to which the realty is devoted, and used for the permanent improvement of the freehold, is a fixture and part of the realty; but if it is attached for a mere temporary use, with the present intention of removal, it continues to be personal property.

Losey & Woodward and T. Morris, for the appellant.

R. S. Reid, for the respondent.

187 CASSODAY, C. J. This is an action commenced February 8, 1898, to recover a certain electrical machine known as a "dynamo," and a certain other electrical machine known as an "exciter," together with certain belts used in operating the same, or the sum of sixteen hundred dollars, the value thereof, in case a delivery cannot be had, together with damages and costs. Issue being joined and trial had, at the close thereof the jury returned a verdict wherein they found for the plaintiff, and that the articles of property mentioned were not fixtures, and that the value thereof was fifteen hundred dollars, and thereupon, and, in pursuance of the order of the court, judgment was entered in favor of the plaintiff and against the defendant for fifteen hundred dollars damages and seventy-four dollars and eighty-nine cents costs. From that judgment the defendant brings this appeal.

It appears from the record and is undisputed that December 27, 1893, the McMillan Mill and Power Company was incorporated; that October 22, 1894, the lands in question¹⁸⁸ and described were deeded to that company and the deed was recorded; that November 14, 1894, the company gave a mortgage upon these lands to one A. S. Swarthout, father of the defendant, for seven thousand dollars, with which to construct the plant in question, and which mortgage was duly recorded;

that the plant was never used for any other purpose than manufacturing and furnishing electric light; that April 2, 1895, the company procured a franchise from West Salem to put up poles and wires and furnish light in that village; that September 3, 1895, that company accepted a proposition made by the Stanley Electric Manufacturing Company to rent the dynamo, exciter, and belts in question, and allow the rental to apply on the purchase price of a larger machine, which the company had the privilege of ordering within four months from the day of shipment, and to be delivered on or before August 1, 1896, or to purchase and apply such rental on the machine in question, the rental to begin October 1, 1895; that thereupon the dynamo, exciter, and belts were delivered to the company, and by the company placed upon the premises in question and used in operating the company's electric plant; that in January, 1896, and in pursuance of the contract for purchase and lease so made, the company purchased the dynamo, exciter, and belts in question and then in use in its electric plant mentioned; that May 7, 1897, such proceedings were had that the plaintiff was appointed receiver of all and singular of the property and assets of the McMillan Mill and Power Company; that the mortgagee, A. S. Swarthout, died testate in March, 1896; that his will was duly admitted to probate; that such mortgage was foreclosed, and the property sold by the sheriff on the judgment of foreclosure and sale to the defendant, and duly conveyed to him by the sheriff's deed, dated October 7, 1897, and recorded.

At the commencement of the trial of this action the parties stipulated to the giving of the mortgage, and the foreclosure ¹⁸⁹ and sale of the premises upon which the machines in question were situated, and that the sheriff's deed upon such sale vested in the defendant all the rights which would follow to the grantee on such foreclosure and sale; that the receiver was appointed as stated; that the suit might proceed without the formality of a writ of replevin going into the hands of any officer or any officer taking charge thereof; that no replevin bond should be required, and no actual service of the writ should be had; and that all formalities be dispensed with.

The evidence is to the effect that the dynamo weighed three and one-half tons; that the lower floor of the mill building was solid rock; that on this rock floor a pier about five feet square and sixteen inches high was built of rock and cement; that the top of it was covered with a bed of cement, and on

and in this bed of cement was laid a frame of timbers about three and one-half feet square; that such cement as was left was mixed up with broken stone and thrown inside the wooden frame; that the dynamo was then set on the top of the wooden frame, and was fastened to it by lag screws going down into the timbers; that it remained and was operated in such way for about six months, when a second foundation was built for it, like the first one, about eight or ten feet away from the first, on the same floor, and the dynamo was moved to and placed on this second foundation in the same manner as it had been on the first, and was about on a level with the power shaft from the mill wheel; that the exciter was a necessary part of the dynamo, and was at all times firmly fastened by screws to the building; that the switch board—without which the dynamo could not be used—was also at all times firmly attached to the building; that September, 1896, the dynamo was removed, and lifted up to the floor above, about fifteen feet higher than the first floor, and some distance further away from the power shaft, so that the belt from the power shaft ran ¹⁹⁰ upward to the dynamo at an angle of about twenty degrees; that it rested on timbers spiked to the floor, and lag screws held the dynamo on these timbers; that it was heavy enough to remain in this position by its own weight without such fastenings.

The only question presented is whether the dynamo, exciter, and belts constituted fixtures to the real estate. It is true, as contended by the plaintiff's counsel, that at the time the company purchased the machines it contemplated buying a larger dynamo, and took the one in question so as not to lose its franchise at West Salem. But it never did purchase any other, and the dynamo in question was of ninety horse-power, whereas sixty horse-power would have supplied all the lights the company ever agreed to furnish. The machines were certainly adapted to the use to which they had been put during the two years immediately prior to the time when the defendant received the sheriff's deed. It was held in this state at an early day that where an equitable mortgagor, with the consent of the owner of personal property, annexed the same to the freehold, the fixture could not be removed as against such prior mortgagee: *Frankland v. Moulton*, 5 Wis. 1. In that case the owner of a steam-engine sold the same to the mortgagor, and assisted in annexing the same to the realty, reserving a chattel mortgage on the same for a part of the purchase

money; and it was held that the chattel mortgage was inoperative as against such prior equitable mortgagee. The rulings in that case have received frequent sanction: *Cooper v. Cleghorn*, 50 Wis. 121; *Taylor v. Collins*, 51 Wis. 127; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150; *Homestead etc. Co. v. Becker*, 96 Wis. 210.

Two of these cases have declared as the test for determining whether articles of machinery are fixtures: "1. Actual physical annexation to the realty; 2. Application or adaptation to the use or purpose to which the realty is devoted; 3. An intention on the part of the person making the annexation ¹⁹¹ to make a permanent accession to the freehold." The same criterion has been maintained in other states: *McRea v. Central Nat. Bank*, 66 N. Y. 489. In the case at bar these tests all seem to be complied with. Certainly, the machines were all adapted to the purpose to which the realty was devoted.

In determining between mortgagor and mortgagee whether erections are fixtures, and hence a part of the realty, or personal property, the same rules prevail which are applicable between grantor and grantee: *Snedeker v. Warring*, 12 N. Y. 170; *McFadden v. Allen*, 134 N. Y. 489. Thus, it has been held that a kettle or boiler in a brewhouse is a part of the freehold, and a fixture: *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680. So hop poles which have been used in the cultivation of hops, although piled upon the premises with the intention of being used again the next season, have been held to be a part of the realty and fixtures: *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68. The same rule prevails as to rails and fencing material deposited along the line, and ready to be put in place. So a statue erected as an ornament to the grounds has been held to be a part of the realty, although it was not fastened to the base on which it rested, and could be removed without fracture: *Snedeker v. Warring*, 12 N. Y. 170. The rule seems to be less stringent in Massachusetts, but even there large and heavy machinery procured for the use of a mill has been held to be a part of the realty: *Howell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235. Of course, in all such cases the purpose of the annexation is a very important consideration: *Homestead etc. Co. v. Becker*, 96 Wis. 210. Where the machinery attached is adapted to the purpose to which the realty is devoted, and is for the permanent use and improvement of the freehold, it is a fix-

ture and a part of the realty; but where it is attached for a mere temporary use, with the present intention of removal, ¹⁹² it continues to be personal property: *Homestead etc. Co. v. Becker*, 96 Wis. 210; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *McFadden v. Allen*, 134 N. Y. 489. In this last case it was held, in effect, that if the mortgagor, or one claiming under him, "intended to assert title to the fixtures, he was bound to do so in the foreclosure suit, and was estopped by his default therein from making such a claim as against the purchaser or his grantee."

The mere fact that at the time of purchasing the machines in question the company intended to purchase a larger dynamo does not imply that it was not adapted to the purpose for which the realty was devoted, nor that it was not its intention to continue its use until supplanted by a more powerful one; in other words, there was no purpose of running the plant without a dynamo. On the contrary, the manifest purpose was to continue the use of a dynamo permanently, and keep the one in question until the company should be able to get a better one. Such time never arrived.

We must hold, upon the undisputed evidence, that the machines in question became fixtures, and the title to the same passed to the defendant as purchaser at the foreclosure sale.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

FIXTURES—TEST OF.—The chief test by which to determine whether an article is a fixture is the intention of the party annexing it to the freehold: *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166; *Edwards etc. Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514. If personal property is placed on realty as an improvement, it is generally deemed a fixture; if placed there for a use which does not enhance the value of the realty, it generally retains its character of personal property: *Winslow v. Bromich*, 54 Kan. 300, 45 Am. St. Rep. 285. What are fixtures is the subject of the monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696.

FIXTURES.—THE MACHINERY and apparatus of an electric light plant do not pass under a judicial sale of real estate to which they are annexed, if when they were annexed it was intended that they should remain temporarily: *Vail v. Weaver*, 132 Pa. St. 363, 19 Am. St. Rep. 598. Yet where machinery is permanent in its character and essential to the purposes for which a building is occupied, it must be regarded as realty, though it may be severed without injury: *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 53 Am. St. Rep. 846. But to make machinery a part of realty it must be attached, actually or constructively, thereto: *Shepard v. Blossom*, 66 Minn. 421, 61 Am. St. Rep. 431.

PERUGI v. STATE.

[104 WISCONSIN, 230.]

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS. — On a trial for murder where self-defense is set up, the disparity in size of the parties is important only in determining what an ordinarily prudent man in the position of the accused would have done under the circumstances, and if these considerations have been fully submitted to the jury, it is not error to refuse an instruction that, "in the assault of a powerful man upon a weaker, the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances."

HOMICIDE — MANSLAUGHTER — INSTRUCTIONS. — Manslaughter in the second degree is, where one unnecessarily kills another while resisting an attempt by such other to commit some unlawful act, and the fact that just before the killing the deceased had "tried to grab" the accused does not require the submission to the jury of the question whether the killing was manslaughter in the second degree, if all of the circumstances show that the killing was not done in resisting such assault.

MANSLAUGHTER IN THE THIRD OR FOURTH DEGREE is where one kills another in the heat of passion. If the evidence fails to show the element of heat of passion, there is no foundation upon which to base a submission of this degree of homicide.

HOMICIDE — MURDER — PREMEDITATION. — Every homicide, not justifiable, perpetrated with a design and determination to kill distinctly formed in the slayer's mind, is murder in the first degree, though the killing follows instantly the formation of such intention and determination.

Carroll & Carroll, for the appellant.

E. R. Hicks, attorney general, A. C. Brazer, district attorney, A. C. Umbreit, assistant district attorney, and E. N. Warner, for the state.

232 **BARDEEN, J.** The plaintiff in error was convicted of murder in the first degree, and sent to state prison for life. He now seeks to have such conviction reviewed by this court on the ground of certain alleged errors in refusing to instruct, and in misdirection of, the jury.

1. The principal ground of defense was that the killing was done in self-defense. Counsel for the accused asked the court to instruct the jury as follows: "You are instructed that the law is that, in the assault of a powerful man upon a weaker, the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances, and the probable ability to defend without fatal recourse must depend upon the means and power of defense in

the assaulted person." This request was refused. The propriety of such an instruction must depend upon the character of the assault and the attendant circumstances. A homicide is justifiable, under the statute, when committed in the lawful defense of the person of the slayer, "when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause for believing that there is imminent danger of such design being accomplished." This instruction assumes that an assault had been made—a question that will be treated in another branch of this opinion. But, admitting that an assault had been made by deceased, the question of disparity in size of the parties did not justify a killing unless both conditions of the statute are met by the surrounding circumstances. The comparative size of the parties is only important in determining what an ordinarily prudent man would have done in the position of the accused, hearing what he had heard, seeing what he ²³³ saw, knowing what he knew, and standing where he stood. All of these considerations were submitted to the jury in the general charge, and we are unable to see how the defendant could have been prejudiced by the refusal to submit this instruction.

2. Another error is said to have resulted in the refusal of the court to charge the jury that the law does not require an assaulted party to call upon bystanders before resisting an attack. The evidence fails to disclose any necessity for such an instruction. The court gave full and complete instructions on the law of self-defense, covering every phase of the testimony, and as favorable to defendant as due regard for the law and the facts would warrant.

3. The court submitted to the jury the question of defendant's guilt of murder in the first and second degrees, and refused to submit either the second, third, or fourth degrees of manslaughter, as requested by the accused.

Manslaughter in the second degree is where one unnecessarily kills another while resisting an attempt by such other person to commit any felony, or do any other unlawful act, or after such attempt has failed: Stats. 1898, sec. 4351.

The very essence of this degree of homicide is that the killing should be unnecessarily done, and done while resisting an attempt to commit a felony, or while resisting an attempt to do any other unlawful act, or after such attempt shall have failed. There is no pretense in this case that the deceased

was killed while attempting to commit a felony. It is insisted, however, that such killing was done while accused was resisting an assault made upon him by deceased. In this view of the case we have read the testimony with the most careful scrutiny. The fracas occurred in a saloon. The parties had been singing, eating, and drinking together for several hours. They were partially intoxicated. Mrs. Martino, the wife of the saloon-keeper, was present, and her attention was directly attracted to the parties. Other witnesses were also present, and saw and heard all that occurred. ²³⁴ Not one of them, even under a close and sharp cross-examination, would testify that any assault was made by deceased. All the evidence upon which the claim of an assault is based came from the accused. On direct examination he testified as follows: "Dencie said: 'No, you cannot be like me. I am better than you every time and every way. I am a Sicilian. I am from the hot kind—what you call it—hot kind. I am better than you any way.' And he got up, and he try to make a grab on me. He had his coat on his hand, standing in this way [indicating]. I was the other side of the table. He got up and tried to grab me. He told me: 'Yes, I am better than you every way. If you have anything to say, come outside. I kick your head off.' When I see he tried to grab me, I skipped behind Mrs. Martino. I said, 'Do you mean that?' and he said, 'Yes,' and struck his hand on the table, and on the impulse of the moment I pulled the gun and shot him. . . . I had no ill-feeling toward him. I shot him because he tell me he kick my head off. He was big enough to kick me. Once he told me I don't get a chance, and I was afraid he was going to kill me, because he told me once." On cross-examination he says that Dencie made some slurring remarks about the Catholic church, and cursed the Madonna, and that when he said that he pulled his revolver and shot him.

Looking at the evidence as a whole, and considering it in the light most favorable to the accused, we are unable to discover anything in it that would warrant the court in submitting this degree of homicide to the jury. Admitting that the deceased "made a grab" at him while they were at the table, all of the circumstances and the accused's own testimony show that the shooting was not done in resisting such assault. As stated in *Fertig v. State*, 100 Wis. 301: "It is only where there is evidence tending to establish a particular offense of criminal

homicide that the trial court is required to instruct the jury in regard to it."

Manslaughter in the third degree is where one kills another ²³⁵ in the heat of passion, without design to effect death, by a dangerous weapon: Stats. 1898, sec. 4354. A full and complete answer to the contention that this degree of homicide should have been submitted to the jury is found in the testimony of the accused. He says: "I was not mad or angry at him at all. That night I was not mad at him. I had no hard feeling toward him, and not angry in the least bit. I knew what I was doing." The evidence failing to show the element of heat of passion, there was no foundation upon which to base a submission of this degree of homicide to the jury.

The same element is necessary in manslaughter in the fourth degree, and the court was fully warranted in refusing to submit it.

4. In making a statement of the facts in the case, the court made use of the following language: "It appears beyond question that on the fifteenth day of April, 1898, in the saloon of John Martino, located at 137 Huron street in this city, the defendant discharged a loaded revolver at Peter Dencie, inflicting upon said Dencie a dangerous wound, from which death ensued eleven days thereafter." This is said to have been error, because "the point whether such wound was dangerous, and whether death resulted eleven days thereafter from such wound, was a disputed and strongly contested question of fact" on the trial. That question may have been strongly contested, but the evidence in regard to it was all one way. Dr. Sifton, the surgeon in charge, and the one who conducted the post-mortem examination, described the wound and his treatment of it. An X-ray examination was made, and the bullet was found to have lodged in the spinal column, at the fourth dorsal vertebra. The conditions were such that an operation was deemed advisable. The doctor testified: "The immediate cause of his death was the shock resulting after the operation. The cause of that shock, and for which the operation was done, ²³⁶ was the gunshot injury, which would have necessarily been fatal. I found the spinal cord injured; certain columns degenerated; gross lesions of the cord could be seen. . . . From my experience as a physician, and knowledge, the man could not recover, as the wound was fatal." No physician disputed the existence of the conditions found by Dr. Sifton, and all admit that, if such conditions existed, the wound was neces-

sarily fatal. The court was amply justified in making the statement quoted: See *Sharp v. State*, 51 Ark. 149, 14 Am. St. Rep. 27.

5. We now come to a branch of the case that has given us considerable trouble. The court gave the following instructions to the jury, which were duly excepted to: "To constitute a murder in the first degree, the killing must have been done willfully, deliberately, and with premeditation; that is, intentionally, sanely, and with prior deliberation, and without legal excuse or justification. 'Willfully,' as used in the information and these instructions, means intentionally; that is, not accidentally. 'Deliberately' means an intent to kill, executed by the slayer in a cool state of the blood, in furtherance of a former design, to gratify a feeling of revenge or accomplish some other unlawful purpose, and not under the influence of a violent passion, aroused by real or supposed grievance, amounting to a temporary dethronement of reason. 'Premeditated design to kill' means a previously formed intention to kill. But while the law requires, in order to constitute murder in the first degree, that the killing should be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is not necessary that the killing should have been considered, brooded over, or reflected upon for a week, a day, or an hour. It is sufficient if there was a design and a determination to kill, distinctly formed in the slayer's mind at any moment before ²³⁷ or at the time the shot was fired which caused the death of the person killed. There may be no appreciable space of time between the intent to kill and the act of killing, and if sufficient deliberation was had to form a design or purpose to take life, and to put that design or purpose into execution by destroying life, then there was, in law, sufficient deliberation to constitute murder in the first degree, no matter whether the design to take life had been for a long time contemplated by the slayer, or whether the design to kill was formed by him at the instant of the fatal shot. It is enough that the intention to kill preceded the fatal act although the act followed instantly."

These instructions are attacked as laying down a rule wholly at variance with the decision of this court in the recent case of *Terrill v. State*, 95 Wis. 276, followed in *Sullivan v. State*, 100

Wis. 283. The importance of this contention has induced us not only to review the two cases mentioned, but many former decisions of this court bearing thereon, as well as decisions of courts in other states with similar statutes. It is asserted that the decision in the Terrill case was a surprise to many of the lawyers and judges of the state versed in criminal law. It was said to be a complete departure from the rule which had prevailed in this state for many years, and introduced into the administration of criminal justice difficulties not theretofore existing. In view of this situation, we have thought it the part of wisdom to again consider the grounds upon which it rests, and, if a mistake has been made, rectify it, and thus save future confusion and uncertainty. In the Terrill case the court charged the jury that if, when the defendant shot deceased, "he did so pursuant to an intent then distinctly formed in his mind to kill," they could not find him guilty of manslaughter in the second degree, "for the defendant, in such case, if he killed Quirk from premeditated design to kill him, is guilty of murder in the first degree." This was given in qualification on an instruction submitting defendant's guilt ²³⁸ of manslaughter in the second degree. The vice of this instruction is said to have consisted in the fact that it "wholly failed to distinguish between the intentional and unnecessary killing under the circumstances stated in section 4351 and a killing when perpetrated by premeditated design to effect the death of the person killed, which last is murder in the first degree." The result of the discussion which followed in the decision was that there might, under our statutes, be a distinct intent to kill under circumstances rendering the slayer guilty of felonious homicide, without the element of premeditated design, essential to murder in the first degree. The case principally relied upon to support this conclusion is *State v. Fee*, 19 Wis. 562 [591], which was a case in which the validity of an indictment for assault with "intent to murder" was under consideration. The charge was laid in the language of the statute, and the court held that, inasmuch as the words "of his malice aforethought" were necessary in indictments for murder, an indictment for assault "with intent to murder" was bad without them. In the opinion it was also said: "In opposition to this view it is said that the words 'intent to kill or murder' excluded the idea of manslaughter, which is a killing without a design to effect death. But under our statutes (Rev. Stats., c. 164, secs. 13, 21), it is clear a person may

intentionally take the life of another and be guilty of manslaughter, and that only." The statutes referred to are substantially the same as sections 4351 and 4363 of the Statutes of 1898. The indictment was held good under another section of the statute, which provides a penalty for an assault with intent to commit manslaughter. In the subsequent case of *Kilkelly v. State*, 43 Wis. 604, this court abandoned the view held in the *Fee* case, and held an indictment good that described the offense in the language used in the latter case, basing it upon the change made in the criminal laws of the state by chapter 137 of the Laws of 1871: See *Cross v. State*, 55 Wis. 261.

239 So far as we are able to discover, that portion of the decision in the *Fee* case which says that there might be an intentional killing, and the slayer only be guilty of manslaughter, was never brought to the attention of the court until the *Terrill* case came up for consideration. In the meantime many cases of criminal homicide were brought to this court in which the sufficiency of indictments and informations was considered, and where instructions given to juries were passed upon. In *Hogan v. State*, 36 Wis. 226, Chief Justice Ryan made a most careful and thoughtful review of our statutes relating to homicides, and laid down certain propositions which stood unchallenged for nearly a quarter of a century. Prior to its rendition, no decision had been made which attempted to cover the same ground. His elucidation of the law of murder in the first degree, and of the scope and meaning of the words used in the statute, has entered into and been adopted as the basis of hundreds of instructions to juries since that time. He stated that it was the policy of the statute to put all statutory murder with actual intent to kill in one degree by itself, and all statutory murders with constructive intent to kill in the lower degrees of crime. What was said in this case was clearly opposed to the expressions noted in the *Fee* case, and made the facts clear that under our statutes all willful homicides committed by a person with a design to kill—that is, with a purpose that was premeditated and distinctly formed—were murder in the first degree. Both the *Terrill* and *Sullivan* cases are opposed to this doctrine, and there is some ground for the claim that they bring into the administration of criminal justice much confusion and many difficulties, best appreciated by those who preside in the trial courts. The fact is undoubted that since the decision in the *Hogan* case the bench

and bar of the state have understood that every homicide perpetrated pursuant to a previously formed intent to take human life, and not under ²⁴⁰ such circumstances as to be justifiable or excusable, was murder in the first degree. In the case of *Roman v. State*, 41 Wis. 312, the court charged the jury as follows, and this court sustained the instruction: "The first inquiry, then, for you is, Was there in the mind of the defendant, at the time Magill was killed, a premeditated design to produce death? No matter what the provocation, no matter what the heat of passion, no matter what the other surroundings may be, unless the act was justifiable, if there was a premeditated design to produce death, it is murder in the first degree." A very similar instruction was approved in the case of *Clifford v. State*, 58 Wis. 477. No doubt there are other cases in this court to the same effect.

The general doctrine seems to prevail everywhere that when the specific intent to kill exists, previously formed, distinct, and settled in the mind, any killing done pursuant thereto is murder: 2 Bishop's Criminal Law, sec. 695. The case of *People v. Lilley*, 43 Mich. 521, is instructive on this point, and directly in line with the cases cited in this state. It says, in effect, that there can be no specific intent without deliberation, and that an act done on a sudden impulse—like manslaughter—cannot be deliberate; that, while manslaughter often involves an intent to kill, the true rule is that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment; and that to reduce the act to manslaughter it must be done while reason is obscured by passion, so that the party acts rashly and without reflection. In New York, where the statutes are similar to ours, the rule is carried farther, and it is said that a homicide may only be classed as manslaughter when there is no design to kill, and that when the purpose to kill is present it is murder in one of its degrees: *People v. Beckwith*, 103 N. Y. 360. As early as 1847 ²⁴¹ the courts of that state asserted the rule that the intention to take life constituted, under their statutes, the main distinction between murder and manslaughter; that, except in the one case when the homicide was committed by one engaged in committing a felony, no homicide was murder without an intention to kill; and with that intention, with the single exception mentioned, unless it be justifi-

fiable, it is murder, whether the intention is formed on the instant or had long been entertained: *People v. Austin*, 1 Park. C. C. 154. In another and later case it is said: "If there be sufficient deliberation to form a design to take life, and to put the design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months." The ultimate conclusion was that, if the intention to take life existed, it was murder: *People v. Clark*, 7 N. Y. 385. A similar proposition is approved in *People v. Hawkins*, 109 N. Y. 408.

We cannot resist the conclusion that every killing, not justifiable, done with that degree of deliberation and with an intent or design sufficiently fixed and settled in the mind as to come within the rule of "premeditated design" laid down in the statute and interpreted by the decisions of this court, is murder in the first degree; and any expression in the *Terrill* case or the *Sullivan* case to the contrary ought not to be adhered to. The intentional killing that may exist consistent with manslaughter in the second degree is the intent which springs from momentary impulse, when the mind is unbalanced, and there is no opportunity for consideration or deliberation.

Another difficulty with the *Terrill* case is that this court seems to have failed to appreciate the force, scope, and effect of the language used by the trial judge. The instruction was: "If you are convinced by the evidence, beyond a reasonable doubt, that when he shot and killed Quirk he ²⁴² did so pursuant to an intent, then distinctly formed in his mind, to kill Quirk, you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Quirk from premeditated design to kill him, is guilty of murder in the first degree." In *Hogan v. State*, 36 Wis. 226, it was said that, "'previously formed intent to kill' and 'premeditated design to effect death' are synonymous terms." And again: "We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill. Design means intent, and both words essentially imply premeditation." Very similar expressions have been used in other jurisdictions. Intent means "that which is intended; purpose; aim; design; intention": *Century Dictionary*. The word "distinctly" is used as synonymous with clearly, explicitly, definitely, precisely, unmistakably. So, when the trial judge used the words,

"intent then distinctly formed in his mind," and followed it with the words "premeditated design," is there any possibility that the jury could have mistaken his meaning? "Premeditate is to think of in advance; to determine upon beforehand; to intend; to design": Anderson's Law Dictionary. The jury are presumed to know the usual and ordinary meaning of words, and, in view of the definitions given, there seems no escape from the conclusion that they understood the words "intent distinctly formed" to be the equivalent of "premeditated design."

It is but proper to say that Mr. Justice Marshall filed dissenting opinions in both the Terrill and Sullivan cases, and that the views we have adopted are in harmony with the principles therein advocated by him.

What we have already said disposes of the objections raised to the portion of the charge first above quoted. The other criticisms to the charge are based upon the fact that the judge told the jury that the premeditated design need not have existed for any particular length of time, but it was sufficient if there was a design and determination to kill ²⁴³ distinctly formed in the slayer's mind at any moment before the fatal shot was fired. There are many cases in the books where this question has been considered. Thus, in *Aszman v. State*, 123 Ind. 347, it is said: "When a homicide has been preceded by a concurrence of will with an intention to kill, and these are followed by a deliberate thought or premeditation, although they follow as instantaneously as successive thoughts can follow each other, the premeditator may be guilty of murder in the first degree." In *Killins v. State*, 28 Fla. 313, the court below charged the jury that "'premeditation' is defined as meaning intent before the act, but not necessarily existing any extended time before the act," and no fault was found with it in the appellate court. In Missouri "premeditated" is defined as "thought of beforehand for any length of time, however short": *State v. Harris*, 76 Mo. 361. We take the following from the syllabus to *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414: "The true criterion of the first degree in murder is the intent to take life. The deliberation and premeditation required by the statute is not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed. An intent distinctly formed even 'for a moment' before it is carried into act is enough." Quoting from *McDaniel*

v. Commonwealth, 77 Va. 281, we have the following: "The killing must be a predetermined killing upon consideration, and not a sudden killing upon the momentary excitement and impulse of passion; . . . and this design to kill need not have existed for any particular length of time. It may be formed at the moment of the commission of the act." In *Hawthorne v. State*, 58 Miss. 778, it is said that the "deliberate design" to effect death of their statute could be formed suddenly, and that the use of a deadly weapon to kill was presumptive evidence of such design. A recent case in Alabama contains the following discussion of the subject: "'Deliberate' and ²⁴⁴ 'premeditated,' as those words are used in the statute, mean only this, that the slayer must intend, before the blow is delivered, though it be but an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow; or, in other words, if the slayer had any time to think before the act, however short such time may have been—even a single moment—and did think, and he struck the blow as the result of an intention to kill by this momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing, within the meaning of the statute defining murder in the first degree": *Daughdrill v. State*, 113 Ala. 7. In New York the rule is thus stated in *People v. Clark*, 7 N. Y. 393: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design is formed at the instant of striking the fatal blow or whether it be contemplated for months. It is enough that the intention precede the act, although that follows immediately." Judge Danforth, in *Leighton v. People*, 88 N. Y. 117, says: "If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome, choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder." Although apparently not intending to modify the rule, Judge Earl makes use of the following language in *People v. Majone*, 91 N. Y. 211: "Under the statute there must not be only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection or consideration upon the matter, for choice to kill or

not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity, which it ²⁴⁵ is sometimes impossible to measure; and whether a deliberate or premeditated design to kill was formed must be determined from all the circumstances of the case." Later cases on the same subject may be found cited in *People v. Constantino*, 153 N. Y. 24, and *People v. Decker*, 157 N. Y. 186. It will be noted that in the cases last above cited the statement is made that the "design must precede the killing by some appreciable space of time." Yet from the language that follows it is evident that it all depends upon the particular circumstances of the affray, and that, if there was time for the slayer to settle and fix upon a design or purpose to kill—that is, for a choice to kill or not to kill—the requirements of the statute have been met, although the formation of the design and the act follow instantaneously.

The case of *Hogan v. State*, 36 Wis. 226, and *Clifford v. State*, 58 Wis. 477, are closely in line with the authorities mentioned, and very many of the expressions excepted to in the judge's charge may be found in one or the other of these cases. What is there said fully meets the objections urged here, and it is not necessary to repeat it. The conclusions here reached are the result of a careful study of the facts in this case and of the law applicable thereto. The case seems to have been tried with due regard to the rights of the accused, the evidence is quite sufficient to warrant the conclusion arrived at by the jury, and the principles of law governing the case justly applied.

By the Court. The judgment of the municipal court of Milwaukee county is affirmed.

SELF-DEFENSE—RELATIVE STRENGTH OF PARTIES.—

On a trial for manslaughter, under the issue of self-defense, the defendant, to show that he acted under a reasonable apprehension of bodily injury, may prove that the deceased was a larger and stronger man than he: *Commonwealth v. Barnacle*, 134 Mass. 215, 45 Am. Rep. 319; *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216. On the law of self-defense, see the extended note to *State v. Sumner*, 74 Am. St. Rep. 717-740.

HOMICIDE—PREMEDITATION is properly defined to mean, "thought of beforehand any time, however short": *State v. Landgraf*, 95 Mo. 97, 6 Am. St. Rep. 26. The true criterion of murder in the first degree is intent to take life, and an intent distinctly formed, even "for a moment" before it is carried into effect, is enough: *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324. To constitute murder in the first degree the killing must be premeditated, but no specific

length of time is required for the premeditation: *State v. Johnson*, 8 Iowa, 525, 74 Am. Dec. 321. There need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind: See the extended note to *Whiteford v. Commonwealth*, 18 Am. Dec. 783.

MANSLAUGHTER is the unlawful killing of another, without malice, express or implied. It may be voluntary, upon a sudden heat, or involuntary, in the commission of some unlawful act: *McWhirt's Case*, 3 Gratt. 594, 46 Am. Dec. 196. See, also, *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111; *Cryer v. State*, 71 Miss. 467, 42 Am. St. Rep. 473. The statutory degrees of murder are treated in the monographic note to *Whiteford v. Commonwealth*, 18 Am. Dec. 774-787.

BERGER v. BERGER.

[104 WISCONSIN, 282.]

VENDOR AND PURCHASER—VENDOR'S LIEN.—Ordinarily, a vendor of real estate has an equitable right to a lien thereon to secure the unpaid purchase money, and the death of the grantee does not extinguish such right of lien.

VENDOR AND PURCHASER—VENDOR'S LIEN—ABROGATION BY STATUTE.—The right to a vendor's lien for unpaid purchase money of land may be changed or abolished by statute.

HOMESTEADS—VENDOR'S LIEN.—A statute providing that if the owner of a homestead shall die not having devised it, it shall descend "free of all judgments and claims against such deceased owner or his estate, except mortgages lawfully executed thereon and laborers' and mechanics' liens," abolishes the right to acquire a vendor's lien on homesteads, and the right to enforce such lien thereon is lost by the death of the owner of the homestead.

Action to have the unpaid purchase money of lands held as a homestead adjudged to be an equitable lien thereon after the death of the owner thereof. Judgment for defendant, and plaintiffs appealed.

W. S. Stroud, for the appellants.

J. H. Rogers, for the respondent.

283 MARSHALL, J. It is conceded that, ordinarily, a vendor of real estate has an equitable right to a lien upon the subject of the sale for unpaid purchase money: *Tobey v. McAllister*, 9 Wis. 463; *Wickman v. Robinson*, 14 Wis. 493, 80 Am. Dec. 787. Also that the death of the grantee does not extinguish the right of lien; that notwithstanding such circumstance, such right may be enforced against the widow and heirs at law of the deceased vendee: *Crowe v. Colbeth*, 63 Wis. 643. It is

contended by the appellants, however, that such rule does not apply to a homestead, because as to such property the common-law rule has, by implication, been abolished by statute.

It is an old and well-established principle of equity that a vendee of land cannot, in good conscience, retain it and not pay therefor in full, and that a court of equity will recognize and enforce the vendor's equitable rights. That right, however, is not a lien in the strict sense of the term, though it is commonly spoken of as such. It is not an interest in the land reserved by the vendor, but is a mere equitable right to a lien. Till the right is judicially fixed upon the land, the vendor is possessed of but the capacity to acquire a lien, which he may lose in various ways. Being but a mere creature of the unwritten law, it may be changed or abolished entirely by statute if thought best in the wisdom of the legislature. The right to a vendor's lien has been abolished by legislative enactments in many of the states, and in others, because of the policy of the recording acts, it has been treated as nothing but a mere floating equity prior to the commencement of judicial proceedings to acquire a specific lien upon the land: *Jones v. Ragland*, 4 Lea, 539. A purchaser without notice of the equity of a vendor is entirely unaffected by it. The conveyance of land by deed ²⁸⁴ passes the entire title, legal and equitable, to the vendee, subject to the vendor's equitable right to resort to it to collect unpaid purchase money, saving, however, the rights of innocent third persons. Except as otherwise provided by statute, and saving the rights of innocent intervenors for value, the vendor may demand the exercise of the power of a court of equity to lay hold of the property and subject it to the payment of the purchase money claim.

Now our statute (Stats. 1898, sec. 2271) provides that: "When the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend, free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers' and mechanics' liens." Looking at that language alone, there is no room for any other conclusion than that the right to a vendor's lien is thereby abolished in case the property is a homestead. But it is said that, in *Carey v. Boyle*, 53 Wis. 574, this court passed upon the question here involved, by sustaining the right of lien. An examination of that case, however, as suggested by appellants' attorney, reveals the fact that the attorneys for both sides of that controversy conceded the

right of lien in favor of a vendor, notwithstanding the death of the vendee. Such right was not questioned, presented, considered, or discussed. The controversy was as to whether a person who furnishes the vendee the money with which to make his purchase is entitled to the benefit of the equitable rule for the protection of vendors. The effect of the statute as to freeing a homestead from the equitable right to a lien for unpaid purchase money upon the death of the vendee did not occur to the counsel who presented the case, or to this court. That is quite evident.

It is further suggested that this court has held that the homestead right cannot extinguish an existing lien of a judgment, and from that it is argued that a purchase money ²⁸⁵ lien, so called, cannot be displaced by the death of the debtor, and that the statute (Stats. 1898, sec. 2271) was not intended to have that effect. The difficulty with that is twofold: 1. As we have shown, the purchase money lien, so called, is not an interest in the land reserved in the vendor; it is not a lien at all in the sense of being a vested interest in the property, as is the lien of a judgment; 2. It by no means follows that, because a judgment lien upon land cannot be extinguished by its subsequent occupancy as a homestead, it will not be extinguished, if a homestead, by the death of the owner. This court has made no decision that way, and it will be noted that the statute expressly provides that the homestead shall descend free of all judgments against the owner. We are referred on this subject to *Upman v. Second Ward Bank*, 15 Wis. 449, and *Bridge v. Ward*, 35 Wis. 687, but they have little or no bearing on the question under consideration. In the first case the point decided was that if a judgment once becomes a lien on real estate, the subsequent occupancy thereof as a homestead will not extinguish such lien—quite a different question than whether a judgment lien on the homestead of the judgment debtor will be extinguished by his death by force of the statute governing the descent of homesteads. In the other case the point decided was that a judgment against a devisee of lands, existing at the time the devise takes effect by the death of the testator, will immediately attach to the land devised and cannot thereafter be extinguished by the mere subsequent occupancy of the land by the debtor and devisee as a homestead. The case goes no further than *Upman v. Second Ward Bank*, 15 Wis. 449.

Again, it is suggested that to give the statute the literal meaning contended for by the appellants would cut off tax liens. That is suggested as conclusively demonstrating the proposition that there is room, at least, for judicial construction of the section under consideration; that, as it cannot ²⁸⁶ be claimed that the lien of a tax will be affected by the death of the owner of a homestead, the lien for purchase money must be governed by the same rule. But, as we have heretofore indicated, there is a wide difference between the mere capacity to acquire a lien—a mere floating equity, as stated—and an actual encumbrance upon the title. Again, it may well be said that the term “claims against the deceased or his estate” refers to claims founded on contract of some kind, and not to impositions laid on property under the taxing power of the state. Further, it is by no means beyond legislative power to free a homestead, by the circumstance of the death of the owner, from even tax liens levied subsequent to a legislative enactment in that regard.

The language of the statute seems plain and unmistakable. “Such homesteads shall descend, free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers’ and mechanics’ liens.” The mere right to acquire a lien cannot be called a mortgage. That term applies only to conveyances in writing of equitable interests in land as security. To give any other meaning to it, or to make any exception when the statute plainly says there shall be none, would violate the plainest principles of statutory construction.

It is often said that in the construction of statutes courts should look to the effects and consequences, but that applies only where there is room for construction—where there is ambiguity of expression or where to follow the literal sense would lead to some absurd result. Here there is no ambiguity. The language is plain. To follow its literal sense will strictly conform to the policy of the law to protect homestead rights. Moreover, there is no hardship whatever in requiring the owner of an equitable right against a homestead to enforce it in the lifetime of the debtor or suffer its loss. On the contrary, it is a very wise provision of law. Laws for the protection of homestead rights are among the ²⁸⁷ most beneficent of legislative enactments, and for that reason they are uniformly liberally construed and rigorously enforced.

We must hold to the plain letter of the statute, deciding that the right to enforce a vendor's lien upon a homestead is lost by the death of the owner of such homestead.

By the Court. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

VENDOR'S LIEN.—A VENDOR OF REAL ESTATE has a lien for unpaid purchase money against the vendee, his heirs, privies in estate, volunteers, and purchasers with notice: *Ellis v. Temple*, 4 Cold. 315, 94 Am. Dec. 200; and it is not discharged by the death of the vendor and the consequent transfer of the debt to his heir or devisee: *Tiernan v. Beam*, 2 Ohio, 383, 15 Am. Dec. 557. On the general subject of vendors' liens, see the notes to *Lagow v. Badollet*, 12 Am. Dec. 262-264; *Schnebley v. Ragan*, 28 Am. Dec. 199-202.

VENDORS' LIENS ON HOMESTEADS are treated in the extended notes to *Magee v. Magee*, 99 Am. Dec. 574-576; *Mertz v. Berry*, 45 Am. St. Rep. 385.

HART *v.* MOULTON.

[104 WISCONSIN, 349.]

REPLEVIN--JURISDICTION.—The provisional remedy in replevin under the statute to obtain immediate possession of the subject in controversy is not essential to the commencement or maintenance of the action, and any error in such proceeding does not affect the jurisdiction of the court to entertain such action and proceed to judgment.

JUDGMENTS—RES JUDICATA.—A judgment of a court of competent jurisdiction is binding between the parties to the action, regarding the subject matter thereof, either as a plea in bar or evidence in estoppel, not only as to every question actually presented and considered, and upon which the court rested its decision, but upon every point within the issues that might have been presented and decided in the case, and is likewise conclusive in any subsequent action between the same parties upon a different subject matter as to every question actually litigated and decided in the former action.

JUDGMENTS — RES JUDICATA — PRIVIES. — A judgment, until reversed, is as binding on privies as on parties as to questions actually decided and upon which such judgment rests, whether it is rendered upon insufficient or false evidence, or erroneous notions of law.

JUDGMENTS—RES JUDICATA—PRIVIES.—The doctrine of *res judicata*, although it binds privies of the parties to the litigation, as well as the parties themselves, recognizes privity as existing only in relation to the subject matter of the litigation.

JUDGMENTS—RES JUDICATA.—The judgment in an action becomes a rule of property as to the subject matter thereof, and passes with it to all persons subsequently claiming under such parties, but does not attach to any other property, the limit of its

effect as to privies being the limit of the particular property, property right, subject matter, or thing involved in the litigation.

SALES—FALSE REPRESENTATIONS—RESCISSION.—If a person misrepresents to another material facts, knowing, or under such circumstances that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other without negligence, relying upon such representations, makes the sale, he can, upon discovering the truth, rescind the transaction and recover the property, saving the rights of bona fide purchasers or encumbrancers thereof in the meantime. To obtain property in the manner indicated constitutes a substantive, actionable wrong, without regard to whether the vendee does or does not intend to pay for the subject of the purchase.

SALES — FRAUDULENT REPRESENTATIONS — RESCISSION.—A sale of property procured by false representations and a purchase with an existing intent on the part of the purchaser not to pay for the property are distinct, actionable wrongs. The former is complete without the existence of an intent not to pay for the property, and the latter is complete though there is no false representation to induce the sale. In case of the latter wrong, false representations and undisclosed insolvency are not necessary elements, but are evidentiary facts tending to establish the intent not to pay, though the latter of itself is not sufficient to establish such fact.

Replevin. Plaintiffs sold a quantity of merchandise on credit to one Nelson, and, after the property had been added to his stock in store and some portion of it sold, the entire stock was seized by the defendant, as sheriff, on an execution issued on a judgment against Nelson. Plaintiffs thereupon rescinded the sale on the ground that they were induced to make it by the false representations of Nelson. They then commenced this action to recover that portion of the property which could be identified in the hands of the sheriff, and an action for damages was brought against Nelson, there being some of the property that could not be found. On the trial the judgment and record in the action against Nelson for damages were offered in evidence and rejected. Judgment for the defendant, and the plaintiffs appealed.

Tenney, Hall & Tenney, for the appellants.

Bashford, Aylward & Spensley, for the respondent.

351 MARSHALL, J. Respondent's attorneys urge that appellants have no standing in this court because the lower court failed to obtain jurisdiction of the subject matter of the action for want of a proper affidavit in the proceedings to obtain possession of the property in advance of a settlement of the controversy between the parties, and because of some other defects claimed in such proceedings. The learned **352** counsel

for respondent rely on the rule that prevailed in the action of replevin at common law, which could be commenced only by the issuance of a writ of replevin. The writ being essential to the commencement of the action, everything necessary to the issuance thereof was deemed jurisdictional. Such is now the case in actions in justice's court for the recovery of personal property and actions there commenced by writ of attachment. But it hardly admits of serious discussion, at this late date, but that such an action in the circuit court, commenced by the service of a summons like any other action, and proceedings to obtain possession of the subject of the controversy in advance of the judgment, are sufficiently independent of each other that the latter may be omitted entirely at the election of the plaintiff. The statute on the subject is so plain, and the long-settled practice so well understood by the profession, that we hardly feel justified in going much further on this branch of the case than to refer to such statute. Section 2717 of the Statutes of 1898 provides that "the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of such property." It will be noted that the very language of the section indicates unmistakably that the action may be commenced and immediate possession of the property not be claimed at all. The section that follows governs the proceedings under the quoted section and requires substantially the same affidavit as was formerly required to secure a writ of replevin. The mere indorsement upon, in connection with, the affidavit, requiring the sheriff to take the property from the defendant and deliver the same to the plaintiff, serves all the purposes of a writ not covered by the summons and the service of it. The distinction between the old action of replevin and the action under the code has been many times pointed out by this court: *Dudley v. Ross*, 27 Wis. 679; *Bigelow v. Doolittle*, 36 ³⁵³ Wis. 115; *Brewster v. Carmichael*, 39 Wis. 456. Where the property in a replevin action is taken and afterward returned to the defendant and retained by him, or where it is not taken at all and is not recovered by the judgment, the action results substantially the same as an action of trover.

The judgment in this action against Nelson was properly rejected because the defendant was not in privity with him for two reasons: 1. Because the defendant's interest in the property, if he obtained any at all under the execution, was ac-

quired before the commencement of the action against Nelson; and 2. Because the property involved in this action is not the property involved in that action.

It is unquestionably the law that a judgment of a court of competent jurisdiction is binding between the parties to the particular action litigated regarding the subject thereof, either as a plea in bar or evidence in estoppel, not only as to every question actually presented and considered, and upon which the court rested its decision, but every point within the issues that might have been presented and decided in the cause, and is likewise conclusive in any subsequent action between the same parties upon a different subject matter, as to every question actually litigated and decided in the former action: *Wentworth v. Racine Co.*, 99 Wis. 26; *Cromwell v. Sac Co.*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Campbell v. Rankin*, 99 U. S. 261; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610. It is further the law that a judgment is as binding on privies as on parties, as to questions actually decided and upon which the judgment rests, whether it be rendered on insufficient evidence, or false evidence, or erroneous notions of the law. So long as the judgment stands it may be invoked in the court where rendered, and in all courts, between the parties to the action and their privies, as the infallible truth: *Cooley's Constitutional Limitations*, 62; *Case v. Hoffman*, 100 Wis. 336.

Though the doctrine stated in the foregoing is firmly established ³⁵⁴ and found in general terms in all text-books and many adjudications, its application is not always free from difficulty, as evidenced by the position of counsel in this case. It is not questioned but that if Nelson were a party to this action the judgment in the action for damages would be conclusive against him, but it does not follow that the defendant has no better right than Nelson. The doctrine of *res adjudicata* does not go that far unless the respondent is in privity with Nelson. It is assumed by appellants that the essential of privity exists, because the right upon which respondent relies is dependent upon the right of Nelson. The difficulty is that the right of property here involved is not that involved in the former litigation. Privies, whether in blood, or in law, or in estate, occupy that relation to others because of derivative rights of property. Privity relates to persons in their relation to property and not to any question independent of property. In the doctrine of *res adjudicata*, privity extends no

further than the particular subject matter or property, the status of which was determined by the judgment as to that particular thing. A person subsequently dealing with it, dependent for his right to do so upon a title acquired of one of the parties to the litigation after that title was impressed by the result of such litigation, in a controversy with the adverse party or a person claiming under him, is concluded by the judgment. Such judgment, in that situation, fixes the status of the property beyond question, whether it was right or wrong. The mere personal effect of the judgment, however, is absolutely confined to the parties to the litigation. It does not attach to and become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment. Failing to keep distinctly in mind that privity relates to property only in the doctrine of *res adjudicata*, and to the particular property forming the subject of the former litigation, often leads courts and practitioners ³⁵⁵ into confusion and error. The term is applicable only to the situation of mutual succession or relation to the same right of property: Herman on Estoppel, sec. 139; McDonald v. Gregory, 41 Iowa, 513; New Orleans v. Citizens' Bank, 167 U. S. 371.

We have had occasion heretofore to refer to the inaccurate manner in which the doctrine of *res adjudicata* is often stated, regarding the binding force of a judgment upon parties to the litigation: *Wentworth v. Racine Co.*, 99 Wis. 26. We may here say, properly, there is quite as much absence of precision in the language ordinarily used in stating the effect of the judgment upon privies as upon the parties to the litigation. The mere statement that a judgment is binding on parties and privies is vague to many minds in that, in its literal sense, it is not confined as to privies to the particular subject of the litigation in which the judgment was rendered. The difficulty in that regard would be avoided if the rule were always so stated as to confine the conclusiveness of a judgment as to privies to the particular property, property right, or thing in controversy in the action.

It is clear from the foregoing that the decision of the trial court rejecting the evidence of the result of the proceedings against Nelson was proper. While defendant claims under Nelson, he is not a successor to the same property involved in the former litigation. The judgment in the first suit as to the parties thereto and persons claiming under them was

stamped upon, and became a rule of property of, the particular thing involved in that suit. There is no privity here as to a thing involved in the former litigation, because the subject of this action was, as to Nelson, affected by the same question as that formerly decided.

There was evidence from which a jury might have found in plaintiff's favor, either or both of two distinct wrongs: 1. That the goods were obtained by false representations as to the financial ability of Nelson; 2. That Nelson ³⁵⁶ obtained the goods with intent not to pay for them. The court was requested to instruct the jury in substance that either of such wrongs was sufficient to entitle plaintiffs to rescind the sale and recover back the subject thereof, which request was refused. The jury were then instructed, in effect, that though the goods were obtained of plaintiffs by false representations, plaintiffs could not recover if Nelson, notwithstanding such false representations, intended in good faith to pay for the property; that is to say, that to obtain property by purchase induced by representations, however false, is not actionable fraud, whatever may be the actual result to the seller, in the absence of intent not to pay therefor.

The refusal to instruct the jury as requested, and the instruction given as stated, constitute the errors upon which appellants' counsel chiefly rely for a reversal. The first impression made by the proposition that a person may obtain property by purchase from another by means of false representations, and retain it against the will of the vendor if such person intended to pay according to his contract, was that it was hardly worthy of serious consideration. Certainly, if such be the law, our system is sadly imperfect. Respondent's counsel cite numerous cases to sustain the ruling of the trial court, which we have carefully examined with the result that in our opinion none of them favors such ruling, but all are against it. It is needless to review the cases at any great length. A few may be taken as a type of all. In *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366, the sole question was, If one purchases property upon credit, with a positive intention, entertained and acted upon at the time, of never paying for the property, is it such a fraud as will entitle the seller to avoid the sale in the absence of any fraudulent representations or false pretenses characterizing the transaction? It will be seen by reading the opinion that it was assumed that a sale induced by false representations on the part of ³⁵⁷ the vendee could

be rescinded. That was a question not in the case. There were no false representations, but there was a distinct intent, entertained by the buyer at the time he made the purchase, never to pay for the property obtained. So the judicial inquiry was whether that alone constituted adequate ground for a rescission of the sale and recovery back of the property.

In *Thompson v. Peck*, 115 Ind. 512, there was a mere omission on the part of the vendee to disclose to his vendor his insolvency at the time of making the purchase. The question of whether that was sufficient ground for a rescission of the sale, in the absence of any intent not to pay, was decided in the negative in accordance with numerous authorities on the subject and the rule distinctly laid down by this court: *David Adler etc. Co. v. Thorp*, 102 Wis. 70; *Consolidated etc. Co. v. Fogo*, 104 Wis. 92. The language of Judge Mitchell, in the *Indiana* case, to the effect that, in order that goods may be reclaimed when obtained on a sale in the regular course of business, there must be some artifice, or false pretense, or fraudulent suppression of the truth, which enables the purchaser to obtain possession of the goods, and it must appear that he intended at the time of making the purchase not to pay for them, must be read with reference to the particular question then under consideration—whether mere neglect of the vendee to disclose his insolvency will warrant a rescission of the sale. To that the court gave a negative answer, saying, in effect, that it would require a specific intent not to pay, and that the failure to disclose the condition of the insolvency, there being no inquiries on the subject and no false representations made, was not sufficient to warrant a rescission. True, the language of Judge Mitchell is somewhat liable to mislead, if one does not have in mind the settled law on the subject and take into consideration the question before the court. Similar misleading language was used by the judge who ³⁵⁸ wrote the opinion in *Taylor v. Mississippi Mills*, 47 Ark. 247, but in a later case, *Bugg v. Wertheimer-Schwartz etc. Co.*, 64 Ark. 12, the court took occasion to state that such language was inaccurate unless read in connection with the facts of the case and the question under consideration, such question being, Is a preconceived intent not to pay sufficient to warrant the rescission of a sale? In *Morse v. Dearborn*, 109 Mass. 593, the question was, If a person falsely represent to another his financial condition for the purpose of obtaining a line of credit with such other, and subsequently buy goods

of such other upon credit so established, the vendor relying upon such false representations, can the vendor, on discovering the truth, reclaim the subject of the sale?

A review of the rest of the long list of cases cited by appellants' counsel would only be a continuation of the showing thus made. The idea that a sale induced by false representations is not voidable in the absence of an intent on the part of the purchaser not to pay comes from confusing statements made in judicial opinions to the effect that a mere failure by the vendee to disclose his insolvency, unaccompanied by any false pretenses or artifice, is not sufficient to warrant a rescission of the sale—that there must be, in addition, an intent not to pay, with the substantive wrong of obtaining goods by false pretenses. In many of the cases found in the books, where there were no false representations and the ground upon which the recovery was sought was intent not to pay, language is used to the effect that mere insolvency and failure to disclose it is not sufficient of itself to establish the essential element of intent not to pay—that there must be, in addition, false representations of some kind, or some artifice resorted to in order to obtain possession of the goods. There is no question anywhere in the books but that a sale induced by false pretenses alone is voidable, or but that a purchase with preconceived intent ³⁵⁹ not to pay is also voidable; but the circumstances, from which the intent mentioned may be inferred, are the subject of much discussion, in which, as before indicated, it will be found stated, over and over again, that false representations of some kind are necessary if the only other evidentiary fact is insolvency of the buyer. Such statements of the law led counsel for the respondent, evidently, and the trial court as well, to the erroneous conclusion that a formed intent not to pay, and false pretenses as well, are essential elements to a complete wrong warranting a rescission of a sale. Mere evidentiary circumstances, so treated in the law, the trial court held were essential elements of an actionable wrong.

Our own decisions are replete with precedents where false representations of material facts, made to induce a sale, relied upon by the seller, were held sufficient to render the sale voidable at the election of the seller, and that whether the purchaser knew or did not know the representations made by him were false, it being held sufficient if he either knew or ought to have known the truth of his statements before making

them: *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Montreal River etc. Co. v. Mihills*, 80 Wis. 540; *Porter v. Beattie*, 88 Wis. 22; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32; *Beetle v. Anderson*, 98 Wis. 5; *Friend Bros. etc. Co. v. Hulbert*, 98 Wis. 183; *David Adler etc. Co. v. Thorp*, 102 Wis. 70. That is in accordance with the doctrine found laid down in the standard text-books: *Benjamin on Sales*, sec. 451. The only distinction recognized anywhere between a sale induced by fraudulent representations and a purchase with intent not to pay, as substantive, independent, actionable wrongs, is that in the former the transaction is deemed to be voidable and in the latter absolutely void. That distinction is made in some jurisdictions, but, as said by the text-writers, it is of no practical importance.

Authorities may be cited without substantial conflict, and 360 much beyond the limits than can be devoted to it in this opinion, in support of the doctrine stated. Many of such authorities are found in the brief of the appellants: *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167; *Mooney v. Davis*, 75 Mich. 188, 13 Am. St. Rep. 425; *Reid v. Cowduroy*, 79 Iowa, 169; *Newell v. Randall*, 32 Minn. 171, 50 Am. Rep. 562; *Stephenson v. Weathersby*, 65 Ark. 631; 45 S. W. Rep. 987; *Bugg v. Wertheimer-Schwartz etc. Co.*, 64 Ark. 12; *Burnham v. Ellmore*, 66 Mo. App. 617; *Burnham v. Jacobs*, 66 Mo. App. 628; *McKenzie v. Weinman*, 116 Ala. 194; *Jandt v. Potthast*, 102 Iowa, 223; *Mauger v. Slavin*, 11 N. Y. App. Div. 483; *Woonsocket etc. Co. v. Loewenberg Bros.*, 17 Wash. 29, 61 Am. St. Rep. 902; *Stevenson v. Marble*, 84 Fed. Rep. 23; *Huthmacher v. Lowman*, 66 Ill. App. 448.

In *Bugg v. Wertheimer-Schwartz Co.*, 64 Ark. 12, cited by appellants' counsel and before referred to, the precise proposition here contended for by respondent's counsel was urged upon the attention of the court and was repudiated as contrary to the settled law, many authorities being cited on the subject, including *Judd v. Weber*, 55 Conn. 267, where it was said that "when goods are obtained by false representations as to the financial standing of the purchaser, an intent of the buyer to pay may lessen the moral turpitude of the act, but it does not suffice to antidote and neutralize the intentional false statement which has accomplished its object of benefiting the purchaser and misleading the seller to his injury."

From the foregoing the following principles may be stated as established: If a person misrepresent to another material

facts, knowing, or under such circumstances that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other, without negligence, relying upon such representations, make the sale, he can, upon discovering the truth, rescind the transaction and recover back his property, saving the rights of bona fide purchasers or encumbrancers thereof in the meantime. To ³⁶¹ obtain property by false representations in the manner indicated constitutes a substantive, actionable wrong, without regard to whether the vendee does or does not intend to pay for the subject of the purchase. If a person purchases property of another with intent not to pay for the same, the vendee may rescind the sale and recover back the subject thereof, as in case of the circumstances first stated. False representations to obtain the property are not a necessary element to make a complete cause of action under the circumstances covered by the second proposition, nor is intent not to pay essential to a complete cause of action under the circumstances covered by the first proposition. The former is complete by the concurrence of false representations of material facts, regarding which the falsifier knows or ought to know the truth, for the purpose of inducing a sale of property to him, and the consummated contract of sale, the seller relying upon such false representations. In such circumstances the law will not permit the wrongdoer to profit by his fraud if the wronged party otherwise elect, saving the rights of innocent third persons. The latter is complete by the purchase of property, the transaction being characterized by a secret, definitely formed intent on the part of the purchaser never to pay for the subject of the purchase. While false representations to obtain possession of the property, and insolvency of the purchaser, are evidence bearing on the existence of the fraudulent intent, neither of such elements is essential to a cause of action to recover back the property. They are evidentiary facts tending to show the fraudulent purpose not to pay. That is all. The two circumstances together, or that of false representations made to obtain possession of the property alone, may warrant a finding of the fraudulent intent mentioned, but the mere fact of undisclosed insolvency, of itself, is not sufficient: *David Adler etc. Co. v. Thorp*, 102 Wis. 70. Such stated principles are fatal to the judgment appealed ³⁶² from. The trial court was clearly wrong as to the law applicable to the evidence in the case.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

REPLEVIN.—AN IRREGULARITY IN THE AFFIDAVIT upon which a writ of replevin is obtained does not invalidate the writ: *Henline v. Reese*, 54 Ohio St. 599, 56 Am. St. Rep. 736.

JUDGMENTS—CONCLUSIVENESS OF.—A judgment rendered in a court of competent jurisdiction is conclusive between the parties and privies in regard to all matters in controversy determined by the judgment: *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133. The conclusiveness of a judgment is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided: *State v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533; though no specific finding may have been made thereon: *Short v. Taylor*, 137 Mo. 517, 59 Am. St. Rep. 508; and it also includes every matter which the parties might have litigated and had decided: *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444; monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 570. Compare *Fuller v. Metropolitan etc. Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132.

RES JUDICATA.—PRIVITY EXISTS, within the rule that judgments bind the parties and privies thereto, only where there is identity of interest: *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 278. The term "privies" includes those who claim under or in right of parties, or who stand in mutual or successive relationship to the same rights of property: *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651. See, too, *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159.

RES JUDICATA.—TO MAKE A MATTER *res judicata* there must be identity of the subject matter of the suit, of the cause of action, of the parties, and of the quality of the persons for or against whom the claim is made: *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; and a judgment, though erroneous, is conclusive on the parties and their privies, until reversed or annulled: *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131.

THE DOCTRINE OF RES JUDICATA is discussed in the extended notes to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572; *Gould v. Sternburg*, 15 Am. St. Rep. 142-144; *Hawk v. Evans*, 14 Am. St. Rep. 250-252.

SALES—RESCISSION FOR FRAUD.—A sale may be rescinded and the property recovered if the buyer at the time of purchasing was insolvent or in failing circumstances, and did not intend to pay for the goods, or had no reasonable expectation of doing so, and fraudulently misrepresented or concealed the facts: *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413. But if the goods have passed into the hands of a bona fide purchaser, his title cannot be defeated by the defrauded vendor: *Truxton v. Fait etc. Co.*, 1 Penn. (Del.) 483, 73 Am. St. Rep. 81; though the title of a purchaser with notice may be: See the extended note to *Reid v. Cowduroy*, 18 Am. St. Rep. 362, on the rescission of sales for fraudulent representations as to credit. Known insolvency not disclosed does not of itself make a purchase fraudulent, though it is evidence of an intent to defraud: See the extended notes to *Thurston v. Blanchard*, 33 Am. Dec. 707; *Reid v. Cowduroy*, 18 Am. St. Rep. 365. A purchase of goods with a preconceived design not to pay

for them is fraudulent, though there may have been no actual, express misrepresentation of any material fact: See the monographic note to *Thurston v. Blanchard*, 33 Am. Dec. 709, on the rescission of fraudulent sales.

SELLECK v. JANESVILLE.

[104 WISCONSIN, 570]

HUSBAND AND WIFE—INJURY TO WIFE—RES JUDICATA.—A recovery by the wife for personal injury to herself, her husband not being a party to the action nor interested therein, is not *res judicata* as to his right to recover for the damages resulting to him from such injury to his wife.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—EVIDENCE.—If, in an action against a city to recover for injury for defects in a sidewalk, the city has admitted notice of the condition of the sidewalk, evidence of complaints to the city authorities as to the condition of such walk and of the introduction of an ordinance requiring the walk to be repaired is inadmissible on the issue as to the existence of defects in the walk.

EVIDENCE—OPINION—DAMAGES.—In an action to recover for personal injury, a physician's evidence that the person injured will require future medical attendance by reason of the injury on an average of twice per week is inadmissible as invading the field of baseless conjecture, and as clearly prejudicial on the question of damages.

EVIDENCE.—PHOTOGRAPHS of an injured foot in variant poses and aggravated aspects, well calculated to arouse the sympathy of the jury, is inadmissible in an action by the husband to recover damages for nursing, medical attendance, and loss of services and society of his wife having such injured foot, when there is other evidence showing the expense and extent of her injury very fully.

EVIDENCE.—IF PHOTOGRAPHS ARE NOT SUBSTANTIALLY NECESSARY or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they are inadmissible in evidence.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—EVIDENCE.—If, in an action against a city to recover for injury caused by a defective sidewalk, the city admits notice of the actual condition of the walk, evidence so remote as not to bear on the question as to whether it was defective at the time of the accident is not admissible.

HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND—MEASURE OF DAMAGES.—In an action by a husband to recover for the loss of his wife's services on account of personal injury, his recovery is not limited to the proved money value of her services as a hired servant, and he may also recover for the loss of wifely services such as are due from her, including her society and assistance.

HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND.—If a wife is bedridden or compelled to move on crutches, suffering severe pain, with shattered nerves, as the result

of personal injury, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, even other than physical, which would otherwise have been within her power.

HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND—CARE IN EMPLOYMENT OF PHYSICIAN.—If the husband of an injured wife uses reasonable care in the employment of physicians of good reputation to attend her, he is not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure, nor is he thereby precluded from recovering all the damages sustained from such injury.

HUSBAND AND WIFE—PERSONAL INJURY TO WIFE—RECOVERY BY HUSBAND.—A husband may recover for the value of his own necessary services in attendance upon his wife, who has received personal injury at the hands of another. Such recovery must be limited to the amount for which he could have procured such attendance by others.

Action by a husband to recover for personal injury to his wife caused by defects in a sidewalk. Judgment for plaintiff, and defendant appealed.

C. F. Burpee, city attorney, and W. Ruger, for the appellant.

Fethers, Jeffris & Mouat, for the respondent.

572 DODGE, J. 1. Counsel for plaintiff argues that the liability of defendant is *res judicata*, by virtue of a previous judgment recovered by plaintiff's wife for her own injuries. This contention has some support from decisions in states where the husband is a necessary party plaintiff to recover for the wife's injuries, and the damages therefor belong to him. Under such circumstances, the argument in favor of the conclusiveness of the judgment is difficult to escape; but where, as in Wisconsin, he is not a party to such action and **573** not interested in the recovery, the reasons for conclusiveness all disappear. A judgment is conclusive only between parties and privies. The husband was, of course, not a party. His wife sued alone. Nor is there any privity between him and his wife as to his now asserted demand. The cause of action is not one which once belonged to her and has been transferred or transmitted to him.

2. Error is assigned for that, against objection, the court admitted in evidence: (a) The testimony of Hanthorn, street commissioner: "Complaints were made to me that the sidewalk was in bad condition; a number of complaints along in the summer"—and that of Alderman Lutz: "Complaints about the walk were made to me some time about October 10, 1892." (b) Testimony of Alderman Lutz that he introduced a resolu-

tion to require a new walk as soon as the complaint was made, and records of common council to show introduction on October 10, 1892, of such resolution, and receipt of a communication October 24, 1892, from Tallman, the owner, stating that he intended to build in the spring, and asking delay till then. The issue as to whether the city had notice of defects, to which this evidence might have been relevant and competent, had been wholly eliminated by admission in the answer. As to the remaining issue, viz., existence of defects, it was wholly secondary and hearsay. The statements or complaints made by others to witnesses Hanthorn and Lutz out of court, and unsanctioned by oath, were incompetent, under the most elementary rules of evidence. The offering of a resolution by Alderman Lutz had no force or relevancy, save as a declaration or admission by him that the walk needed to be rebuilt, and the same is true of the communication from Tallman. It hardly needs to be stated that declarations or admissions by third persons are not competent evidence to establish a fact. The issue whether the walk was defective was sharply disputed, and this secondary and hearsay evidence on the subject assuredly ⁵⁷⁴ influenced the minds of the jury, and must have been prejudicial to the defendant. Its admission was error.

3. A medical expert testified, over objection, to his opinion that: "It is most certain that Mrs. Selleck will require future attendance of a physician by reason of this injury. Judging by the past, she will require attention every two or three days—a fair average, I would say, would be twice a week for the future. Our usual charge is one dollar a visit." This court has recently announced the decision (without the writer's concurrence then, but to which he now yields in deference to the rule of stare decisis) that such testimony is improper, as invading either the field of baseless conjecture or that of common knowledge, where the expert cannot guide, though he may mislead, the jury: *Crouse v. Chicago etc. Ry. Co.*, 104 Wis. 473. Its admission was error, and clearly prejudicial on the question of damages.

4. Error is assigned upon admission in evidence of three photographs, showing the injured foot in variant poses. The distortion was most serious, and its exhibition in aggravated aspects was well calculated to arouse the sympathy of the jury, and to divert their minds from the merely secondary and pecuniary considerations alone relevant to the plaintiff husband's recovery, to thoughts of pain and suffering, both physical and

mental, which the injured woman had endured. The photographs were wholly unnecessary to a full description and explanation of her condition, so far as it affected the damages recoverable, namely, expenses for nursing and medical attendance, and loss of service and society. Other evidence having shown that expense and the extent of impairment of the wife's condition very fully, the appearance of the foot could hardly be instructive or helpful. In *Baxter v. Chicago etc. Ry. Co.*, 104 Wis. 307, this court (Marshall, J.) said: "There is a limit to the use of photographs as evidence, and it was nearly, if not quite, reached in this case. They are competent for some, but not for all, purposes. ⁵⁷⁵ They may be used to identify persons, places, and things, to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same, and the photographs will better show the situation than will testimony of witnesses, and where the testimony will be better understood by the use of photographs. . . . There must be some substantial, legitimate reason for the use of such representations, else they should not be received." We are unable to resist the conclusion that the limit so indicated was passed in the present case. There was no substantial, legitimate reason for their use in order to show even the degree of disablement, so far as relevant to the damages the jury had a right to consider. The situation is much as if, in an action under the statute to recover damages for causing death, the plaintiff should show by photographs a terribly mangled condition of the deceased. As a corollary of the rule in the *Baxter* case, we hold that where photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded: *Gilbert v. West End St. Ry. Co.*, 160 Mass. 403, 405; *Harris v. Quincy*, 171 Mass. 472; *Fore v. State*, 75 Miss. 727; *Dobson v. Philadelphia*, 7 Pa. Dist. 321.

5. Some evidence was admitted, over objection, bearing on the condition of the sidewalk at times extending as much as two years prior to the injury. Most of it was, however, connected with the time of the accident by some showing of continuance of the conditions. The court seems to have been induced to admit some of this evidence as relevant to the issue of notice to the city. While it may be unnecessary to decide whether the admission of any of this evidence constituted re-

versible error, we deem it proper, in view of a new trial, to point out that where notice of the condition is admitted, so that no proof thereof is necessary, no evidence ⁵⁷⁶ should be received which is too remote to bear on the question whether the walk was defective at the very time of the accident.

6. Appellant complains because the court instructed the jury that: "In finding the value of her services, you may consider the loss, if any, sustained by her husband in the deprivation of regular attendance, services, and comfort of his wife's society. The comfort of her society can hardly be separated from her services, and the word 'service' implies whatever of aid, assistance, comfort, and society the wife would be expected to render or bestow upon her husband under the circumstances, as shown by the evidence in the case, in the condition in which the husband and wife were placed." The criticism is that the jury were thereby authorized to allow as damages something in excess of the proved money value of the wife's services as a hired servant. The action here brought was well known to the common law, except that our statute (Stats. 1898, sec. 1339) and its predecessors were necessary to render a municipal corporation liable thereto: *Hunt v. Winfield*, 36 Wis. 154, 17 Am. Rep. 482. It is brought in the husband's own behalf, and for a wrong done to his own rights. It closely resembles the action of the father for injury to or disablement of his child, or the master for his servant. The measure of recovery differs just as the rights invaded differ—just as the legal duty owed by the wife differs from that owed by the child or servant. Each of the latter owes the duty of service or labor. The wife owes a broader and a higher duty, of which physical labor may or may not be a part, according to circumstances. Her duty is called in the common-law writs "consortium," which means conjugal society and assistance: *Anderson's Law Dictionary*; *Bouvier's Law Dictionary*. So we find that the common law recognized the right of the husband to maintain action against one who tortiously impaired the ability of a servant, child, or wife to perform her duty, and thus deprived the owner of ⁵⁷⁷ his right thereto. Such action, if based on personal injury, was in trespass on the case, *per quod servitium amisit* if for a child or servant, and *per quod consortium amisit* if for the wife: 3 *Blackstone's Commentaries*, 139, 142; *Winsmore v. Greenbank*, *Willes*, 577. From before the days of *Blackstone* down to the present time, the authorities, English and American, are, without well-con-

sidered exceptions, in accordance with the reason above stated—to the effect that the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word "services" is used, it signifies wifely services, such as are due from her, and includes the idea of her society: *Guy v. Livesey*, Cro. Jac. 501; *Hyde v. Seyssor*, Cro. Jac. 538; *Cooley on Torts*, 266; 2 *Hilliard on Torts*, 498; *Schouler on Domestic Relations*, 5th ed., sec. 77; *Reeve on Domestic Relations*, 4th ed., 88; 3 *Sutherland on Damages*, sec. 1252; *Meese v. Fond du Lac*, 48 Wis. 323; *Shanahan v. Madison*, 57 Wis. 276; *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79; *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9, 72 Am. Dec. 287; *Kelly v. New York etc. Ry. Co.*, 168 Mass. 308, 60 Am. St. Rep. 397; *Laughlin v. Eaton*, 54 Me. 156; *Drew v. Peer*, 93 Pa. St. 234; *Jones v. Utica etc. R. R. Co.*, 40 Hun, 349; *McKinney v. Western etc. Co.*, 4 Iowa, 420; *Mowry v. Chaney*, 43 Iowa, 609; *Berger v. Jacobs*, 21 Mich. 215, 221; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800. The wifely services or consortium may, and often do, include services such as might be rendered by hired servants; and, when that is the case, it is usually permitted to prove the customary or market value of such services by testimony of experts familiar with such market value, but it is not necessary that any such physical services should customarily be rendered in order to justify some recovery: *Bigaouette v. Paulet*, 134 Mass. 124, 45 Am. Rep. 307; *Kelly v. New York etc. R. R. Co.*, 168 Mass. 308, 60 Am. St. Rep. 397; *Berger v. Jacobs*, 21 Mich. 215; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800; *Cooley on Torts*, 266; 3 *Sutherland on Damages*, sec. 1252. In the light of these principles, it was not error to instruct the jury that, in placing a value upon the wife's services, they were ⁵⁷⁸ to understand that word as including, not alone such services as a hired domestic servant might perform, but also such as the wife can, and this wife was accustomed to, render, if they found those to be disabled by her injuries, which was substantially the effect of the charge. From the foregoing it is apparent that the husband's damages are the value of his wife's services to him, as the court also charged under exception. They cannot be entirely the subject of market value, though part of them may be. Their value is not to be tested by what they could be hired for, or what another would pay for them, for they are not a hireable commodity. This does not at all deny what was said in

Keller v. Gilman, 93 Wis. 9, 12, for there the subject of inquiry was the market value of certain services, of a kind which might be the subject of hiring, as to which opinion evidence only of value generally, and not to any particular person, has always been held permissible. It should be noted, however, that such of the services or consortium owed to the husband as are not mere physical services are less likely to be impaired by an injury merely physical. Because a wife is incapacitated to perform such services as a cook or a housemaid, it by no means follows that she may not extend to her husband the aid of her society and counsel, or her pervading superintendence and care over his household, or nurture and guidance of his children. In the case before us much of conjugal assistance and society was within the injured woman's power, and a caution to this effect might very properly have been given, though its omission, in absence of any request therefor, is, of course, not error. We cannot, however, concur in appellant's view that the evidence disclosed no loss of such elements of the consortium. Of a woman bedridden or compelled to move on crutches, suffering severe pain, with shattered nerves, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, even other than physical, which would otherwise have ⁵⁷⁹ been within her power: *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800.

7. There was no error in charging the jury that plaintiff, having used reasonable care in the employment of physicians of good reputation, was not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure: *Selleck v. Janesville*, 100 Wis. 157, 69 Am. St. Rep. 906.

8. The court charged that plaintiff might recover the value of his own services in necessary attendance upon his wife by reason of her injuries, and refused a request for a contrary instruction. The plaintiff owed his wife the duty of care and nursing rendered necessary by her injuries, and was entitled to recover the expenses therein necessarily incurred. If he devoted his own time and services, to the loss of their pecuniary value if otherwise employed, it was obviously a legitimate expense—as much as if he had hired such attendance from another; and he might recover therefor, subject, of course, to the rule that he must not thus enhance the damages. However valuable his own time and services, he should not be allowed therefor more than the amount for which he could have

hired reasonably competent attendance and nursing by others. No such limitation was requested to be given in the charge to the jury, however; hence no error: *Salida v. McKinna*, 16 Colo. 523.

As the cause must be remanded for a new trial, we deem it unnecessary to discuss the further assignments of error as to the details of the trial. They are either not tenable, or the errors complained of are such as are not likely to be repeated.

By the Court. Judgment reversed and cause remanded for a new trial.

RES JUDICATA.—WHERE A MARRIED WOMAN brings an action against a trustee to set aside a trust deed, the judgment of the court is *res judicata*, and estops her husband from bringing a subsequent action against the trustee to set aside such deed: See the extended note to *Gayer v. Parker*, 8 Am. St. Rep. 230. For other instances of *res judicata*, see the notes to *Gould v. Sternburg*, 15 Am. St. Rep. 142-144; *Hawk v. Evans*, 14 Am. St. Rep. 250-252; *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572.

EVIDENCE.—**PHOTOGRAPHS OF THE INJURED FOOT** of a wife, which are unnecessary to show the material facts and have a tendency to arouse the sympathy of the jury, are not admissible as evidence in an action by a husband for injuries to his wife: See the extended note to *Baustian v. Young*, 75 Am. St. Rep. 474, on photographs as evidence.

HUSBAND AND WIFE.—IF A WIFE SUFFERS PERSONAL INJURIES from the negligence of another, her husband may recover compensation for his consequential injuries therefrom, including his loss of consortium: *Kelly v. New York etc. R. R. Co.*, 168 Mass. 308, 60 Am. St. Rep. 397. See, also, *Bowdle v. Detroit St. Ry. Co.*, 103 Mich. 272, 50 Am. St. Rep. 366; *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72.

GOLDBERG v. AHNAPEE & WESTERN RAILWAY CO.

[105 WISCONSIN, 1.]

RAILROADS—BAGGAGE—DELIVERY IN ADVANCE.—An owner of baggage has the right to deliver it at a railway station such time before the starting of a train as may be reasonably necessary for obtaining a ticket, checking the baggage, etc., but he cannot, by an earlier delivery, without the consent of the carrier, impose upon the carrier liability of an insurer.

RAILROADS—BAGGAGE, PRESCRIBING TIME WHEN WILL BE CHECKED.—If a railway, by rule, prescribes thirty minutes before train time within which to check baggage, but it is delivered at 5 o'clock in the evening for a train which leaves at 6 o'clock the next morning, because the delivery in the morning would be inconvenient and more expensive, it cannot be said, as a

matter of law, that such limit is unreasonable, or that twelve hours is reasonable, or rendered reasonably necessary by the circumstances.

RAILROADS — CHECKING BAGGAGE — EVIDENCE AS TO—WHAT NOT PREJUDICIAL.—If baggage is delivered at a railway station at 5 o'clock in the evening for a train which leaves at 6 o'clock the next morning, but is destroyed during the night by fire, and an action is brought for its loss, the admission against objection of testimony that the delivery of the baggage in the evening was of no advantage to the company is not prejudicial to the plaintiff, where he knew that the agent was prohibited from checking baggage until half an hour before train time.

EVIDENCE—PAROL TESTIMONY AS TO A PRINTED RULE ON A CARD DESTROYED BY FIRE.—In an action to recover the value of baggage taken to a railway depot for transportation, but which was burned with the station before the train started, parol evidence of the substance of a rule, printed on a card tacked up in the depot and prohibiting the checking of baggage until within half an hour of train time, is not prejudicial to the plaintiff, who had knowledge of the rule. Furthermore, any objection to parol testimony as to the contents of such card is obviated by proof that it was destroyed in the burning of the station.

Action to recover the value of trunks burned at a depot. One of the plaintiffs, a traveling man, sent his trunks, containing merchandise, and not baggage, to the defendant's railway station, at about 5 o'clock on the evening of January 27, 1897, intending to check them as baggage the next morning on a train leaving about 6 o'clock. They were delivered in defendant's freight-house, without the knowledge of the defendant or its station agent, and, though they were noticed there when the house was shut up in the evening, the agent had no knowledge of their ownership or the purposes for which they had been left. The trunks were sent to the depot in the evening because the delivery would be inconvenient and more expensive in the morning. They were destroyed by fire during the night, without fault or negligence on the part of the defendant. Suit was brought for their value. There was a judgment for the company, and the plaintiffs appealed.

Felker, Doe & Felker and Y. V. Dreutzer, for the appellants.

Greene, Vroman, Fairchild, North & Parker and C. E. Vroman, for the respondent.

2 DODGE, J. 1. The liability of a carrier for ordinary baggage while in its possession for carriage as such is very different ³ from the liability while the same articles are in storage with it. In the first case it is an insurer; in the latter, liable only as a bailee for ordinary care. The exact point at which the possession for carriage begins and ends is not easy

to define, but it is not such as to exclude some reasonable time at stations before and after actual transportation. After transportation the higher liability continues only for such time as is reasonably necessary to present duplicate checks and to remove the baggage: *Hoeger v. Chicago etc. R. R. Co.*, 63 Wis. 100, 53 Am. Rep. 271. No reason is apparent why the same rule should not apply to the delivery for transportation, so that the owner has the right to deliver at the station such time before starting of train as may be reasonably necessary for obtaining ticket, checking the baggage, etc., and that he cannot impose this extreme liability by earlier delivery without the consent of the carrier: *Green v. Milwaukee etc. R. R. Co.*, 38 Iowa, 100; *Goodbar v. Wabash Ry. Co.*, 53 Mo. App. 434. This defendant had, by a rule known to plaintiff, prescribed thirty minutes before train time as such reasonable time. It certainly cannot be said, as matter of law, that such limit is unreasonable, nor that twelve hours is reasonable, or was rendered reasonably necessary by the circumstances. The submission of that question to the jury was not an error of which plaintiff can complain. As to whether defendant assented to such delivery, and accepted plaintiff's trunks for carriage as baggage, with knowledge of their contents, was a disputed question of fact, and a finding in the negative has abundant support in the evidence.

2. The overruling of the objection to the testimony of defendant's agent, Reitzel, that there was no advantage to the company in having the trunks delivered the night before, was without prejudice; for it appeared by plaintiff's own testimony that the agent was prohibited from checking baggage until half an hour before train time, and that the convenience of the company obviously could not be enhanced by delivery of baggage earlier than that time.

3. Parol proof of the substance of the rules, printed on a card and tacked up in the depot, prohibiting checking until within half an hour of train time, could not have prejudiced plaintiff, for he testified that he had knowledge of such a rule. Further, any objection to parol testimony as to the contents of such card was obviated by proof that it had been destroyed in the burning of the station.

We find no reversible error in the record.

By the Court. Judgment affirmed.

RAILROADS—BAGGAGE—DELIVERY FOR TRANSPORTATION.—A railroad company is presumed to receive baggage for transportation, and not for storage, and its liability commences as soon as the baggage is delivered to and received by its agent, notwithstanding the fact that it was not checked at the time it was received, and would not be for several hours, nor until fifteen minutes before the train started, and that the passenger was so informed: *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281, 83 Am. Dec. 143. A rule of a railway company that baggage shall not be checked until a ticket has been procured is a reasonable regulation, but a rule that a baggage-master shall not receive into the baggage-room baggage until a ticket shall have been procured is an imposition upon the public, unreasonable, and void: *Coffee v. Louisville etc. R. R. Co.*, 76 Miss. 569, 71 Am. St. Rep. 535.

EVIDENCE—SECONDARY—WHEN ADMISSIBLE.—IF A WRITING IS SHOWN TO BE LOST, secondary evidence of its contents may be received: *Spears v. Lawrence*, 10 Wash. 368, 45 Am. St. Rep. 789.

DILLMAN v. CARLIN.

[105 WISCONSIN, 14.]

APPEAL.—FINDINGS OF FACT made by a trial court cannot be disturbed on appeal unless they are contrary to the clear preponderance of the evidence.

CHECKS—EQUITABLE ASSIGNMENT—PREFERENCE.—As between drawer and payee, a check is an equitable assignment of funds in a bank, and the payee will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the drawee.

CHECKS—CONFLICT BETWEEN AND GARNISHMENT.—If a check is given with the intention of transferring a bank credit, but the bank is garnished in a suit against the drawer before the check is presented, the payee is entitled to the fund as against the garnishing creditor.

Garnishee suit. The principal defendant, Schmidt, having some money in a savings bank, gave a check therefor to the defendant, Carlin, intending thereby to transfer the credit in payment for some personal property. Under the rules of the bank, the money could be withdrawn only upon presentation of the proper depositor's book, but neither party knew that fact. It afterward came to their knowledge, however, whereupon Schmidt delivered his depositor's book to Carlin. About eight days after Carlin received the check, and before he presented it for payment, the bank was garnished by Dillman, the appellant, in a suit against Schmidt. Two days afterward, the check was presented for payment, but it was refused, because of the pendency of the garnishee suit. The bank paid the money

into court and was discharged, and the payee was interpleaded in the garnishment proceedings. The court found that Carlin was the equitable owner of the money and rendered judgment accordingly. The plaintiff appealed.

Sheridan & Evans and Philip Sheridan, for the appellant.

Greene, Vroman, Fairchild, North & Parker, and J. R. North, for the respondent.

16 MARSHALL, J. These two questions are presented for decision on this appeal: 1. Are the findings to the effect that the respondent took the check from Schmidt for value and in good faith as to the latter's creditors, and with intent on the part of both parties to the transaction that the bank credit drawn upon should thereby be assigned to respondent, **17** supported by the evidence? 2. Did such facts constitute respondent the legal or equitable owner of the indebtedness of the bank to Schmidt?

The first proposition is ruled by the familiar doctrine that findings of fact made by a trial court cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence. Applying that test to the record, no error is discovered.

The second proposition is ruled by *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247, and *Skobis v. Ferge*, 102 Wis. 122. At least since the decision in the first case cited, it has been the law of this state that if the owner of a bank credit give a check thereon, for value, to another, with intent to transfer such credit, or a part of it, to such other, the latter will thereby be constituted at least the equitable owner of such fund or sufficient thereof to satisfy the check, so that whether the bank be legally liable to the check holder or not, if by any means the parties interested are brought into a court of equity while the bank is yet the debtor and can be protected against paying its debt twice, and it stands indifferent as to who gets the money so long as it is protected, the check holder will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the drawee. In the *Skobis* case that rule was affirmed and applied.

It is well understood that there is much conflict in the authorities as to the rights of a holder of a bank check or order payable out of a particular fund under such circumstances as exist in this case. It is useless to try to harmonize them or do more than to recognize the existence of the conflict.

The law of this state, as indicated, is firmly established. It accords with what is stated by standard text-writers to be the true doctrine: Daniel on Negotiable Instruments, secs. 22, 1638, 1643. A check for a part of a bank credit, intended to transfer ¹⁸ such credit pro tanto, operates that way in equity as against any subsequent claimant thereof, saving the rights of the drawee, particularly as to being obliged to pay such part of the fund twice. A check intended to transfer an entire fund operates that way at law, saving, as before, the rights of the drawee, timely and sufficient notice being required to fix its liability to the assignee. The whole subject referred to was so thoroughly discussed by Mr. Justice Dodge in the Skobis case that most questions that are likely to arise in respect to the rights of the owner of a check or order for payment out of or by a fund in the hands of the drawee, will be found there sufficiently answered.

By the Court. The judgment of the circuit court is affirmed.

APPEAL.—FINDINGS OF FACT.—If there is not a clear preponderance of evidence against a finding, it must be sustained on appeal: Singleton v. Hill, 91 Wis. 51, 51 Am. St. Rep. 868.

CHECKS—ASSIGNMENT OF FUND.—There is one line of cases holding that, as between the drawer and the holder, a check is an assignment, equitable if not absolute, of so much of the fund as the check calls for: Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 72 Am. St. Rep. 259; Industrial etc. Sav. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45; but other cases hold that the giving of a check upon a bank is not, unless it is accepted, an assignment of the depositor's claim, and passes no title, legal or equitable, to his moneys on deposit in such bank: Cincinnati etc. R. R. Co. v. Bank, 54 Ohio St. 60, 56 Am. St. Rep. 700; note to Whitehouse v. Whitehouse, 60 Am. St. Rep. 284. See monographic note to Hemphill v. Yerkes, 19 Am. St. Rep. 609-612, on whether a check is an assignment of the fund drawn upon. According to the latter view, a check is subject to a garnishment served after its issuance and delivery, but before its payment by the bank: Commercial Bank v. Chilberg, 14 Wash. 247, 53 Am. St. Rep. 873; and the check would not be entitled to precedence over an assignment for the benefit of creditors made by the drawer before the check is accepted or presented for payment: Akin v. Jones, 93 Tenn. 353, 42 Am. St. Rep. 921. A check is an assignment of the funds of the drawer to the amount of the check, as between the drawer and payee, when the check is given, but as between the payee or holder and the drawee, the check is not complete as an assignment until presentation for payment: Northern Trust Co. v. Rogers, 60 Minn. 208, 51 Am. St. Rep. 526.

AGEN v. METROPOLITAN LIFE INSURANCE COMPANY.

[105 WISCONSIN, 217.]

INSURANCE—DEATH BY SUICIDE—PRESUMPTION AGAINST.—If death results under such circumstances that it may or may not have been caused by suicide, the presumption is against death by suicide, but this presumption is rebuttable and easily yields to physical facts clearly inconsistent with it.

INSURANCE—OVERCOMING PRESUMPTION OF DEATH BY SUICIDE.—The presumption against death by suicide is overcome by proof of circumstances pointing to, and consistent with, the theory of suicide, and inconsistent with any other reasonable theory, particularly where all the reasonable probabilities are in favor of suicide.

TRIAL.—A JURY MUST NOT GO BEYOND THE LINE OF REASONABLE PROBABILITY. Hence, if a right to recover turns upon the question as to whether an insured person committed suicide, the court should direct a verdict for the defendant, where the evidence all points to suicide as the cause of death so as to leave no reasonable probability to the contrary; or if a verdict is rendered for the plaintiff, under such circumstances the court should set it aside and grant a new trial.

Action on a policy of life insurance, the right to recover turning on whether the insured committed suicide. A motion for the direction of a verdict for the defendant was denied. The defendant also moved that a general verdict for the plaintiff be set aside as not justified by the evidence. This motion was denied and the defendant company appealed from a judgment for the plaintiff.

J. A. Murphy, for the appellant.

Crownhart & Foley and C. H. Crownhart, for the respondent.

218 MARSHALL, J. As we view the record on this appeal, a decision of the question of whether the evidence warrants **219** the verdict is all that is required. Such evidence is nearly all circumstantial. The undisputed facts are substantially as follows:

The deceased, Clarence S. Griffin, at the time of his death, resided with his family, consisting of his wife and step-daughter four and one-half years of age, in the second story of a dwelling-house in the city of Superior, Wisconsin, which was occupied on the first floor, partly by William Butler and family and partly by Louis Burgraff and family. The Griffin kitchen was in the front part of the house at the right of the front entrance. From it there was an outside door leading to

a back stairway, the foot of which reached to about the location of the door of the Butler kitchen. There was also a door between the Griffin kitchen and their dining-room back of such kitchen; also a door connecting such dining-room with a bedroom used by the family for sleeping apartments, such room being at the left of the dining-room as the latter was approached from the kitchen. There was a commode near the bedroom door inside such room at the right of the entrance, in the drawer of which the deceased customarily kept a revolver when it was not on his person. He always placed it there evenings after his return from his day's labor, if he had carried it during the day.

About 9:15 on the evening of December 14, 1894, the Griffin family all being at home, and the women occupants of the lower part of the house having retired for the night, footsteps were heard in the upper kitchen as of some person moving hurriedly across the floor. Immediately thereafter Mrs. Griffin left such kitchen by the back stairway, taking with her, or followed by, the little girl, and closed the door behind her. She ran quickly down such stairway, and in a nervous and excited manner rapped sharply at Mrs. Butler's kitchen door. About the time the circumstances just related were occurring, a person passed from the Griffin dining-room ²²⁰ into the bedroom and there disturbed some furniture, creating a noise distinctly heard by those occupying the apartments below, then passed rapidly back from the bedroom through the dining-room into the kitchen and to the back door thereof, which he noisily opened and swung back, apparently, so as to forcibly strike the wall, then crossed the room from the location of such door to a point near the door leading to the front hall, making a noise in his course something like that caused by turning over a chair, which was immediately followed by the report of a pistol in the room, then by a sound as if of a body falling on the floor, and then by human groans and a noise as of the beating of feet on the floor. The report of the pistol and the signal given by Mrs. Griffin of her presence at Mrs. Butler's door occurred at about the same instant. Mrs. Butler responded to such signal by opening her door. Mrs. Griffin, apparently much excited and frightened, inquired for milk for her little girl, then passed into Mrs. Butler's apartments, exclaiming almost immediately that she was afraid her husband had shot himself. She then cried and appeared to be in great mental distress. She made no further mention of desiring

milk for the child, but clasped her hands, continued to cry, and again exclaimed, "He shot the revolver and I am afraid he has shot himself." She did not go to her husband then or afterward till some time the next day and after he had been removed to the hospital. No one was in the Griffin apartments but the deceased from the time Mrs. Griffin left them as related till about five minutes after the shot was heard, when several persons went there and discovered the following conditions of things: The back entrance door to the kitchen was partly open, the dishes were on the table about as they were left at the last meal, a light was in the kitchen, and a chair was partly turned over on the floor. The commode drawers, or one of them, was pulled entirely or partly out. On the side of the room nearly opposite such back door, ²²¹ Griffin lay as if he had fallen backward against the wall, then slid down, leaving his head and shoulders against the wall, and his limbs nearly straight out on the floor toward the center of the room, with his hat on the floor between them. There was a bullet wound in the right side of his head a little above and about midway of a line drawn from the eye to the center of the ear. An upturned chair was a short distance away from him. His hands were by his side and he was moving them and his feet convulsively. His revolver was by him on the floor, partly under his legs and a little toward the left side, and near it was a revolver case in which it was customarily kept. There were no powder marks on the head. The revolver showed that it had been recently discharged. The man died the next day without having regained consciousness.

A postmortem examination was made which revealed the following facts: The bullet passed into the head nearly at right angles with the side. It ranged slightly upward and lodged against the opposite table of the skull and was somewhat flattened. The inner table of the skull where the bullet entered was considerably fractured, pieces of it having been driven into the brain substance, which, on that side of the head, was much lacerated, disorganized, and congested with blood. There was no evidence observed of powder, fire, or smoke having been projected into the brain, nor any external indication of fire, smoke, or powder. The evidence tended to show that the revolver, when discharged, must have been held at least eight inches from the head to account for the absence of discoloration on the surface in the vicinity of the wound, or that it was held firmly against the head. The latter situa-

tion at the time the pistol was discharged, while it would account for absence of external evidence, would suggest the presence of internal evidence of fire, powder, and smoke having been forced into the brain; but, as before stated, no such evidence was discovered. The ²²² man did not die till about twenty hours after he received the wound, and the autopsy was not made till some time after death. The brain substance was very badly lacerated, disorganized, and discolored by blood, so as to account, in a measure, for the absence of discoloration by smoke, powder, or fire, and of any other evidence of the presence of any foreign substance in the brain, except the bullet and pieces of bone carried in by it, other than the general disorganized condition of the brain substance on the side of the head where such ball entered.

There was evidence of experts to the effect that if a pistol be discharged with the muzzle pressed firmly against the head, there may be no evidence of fire, powder, or smoke, externally or internally. There was also expert evidence to the contrary, some of it by persons who had never seen such a case. There was evidence of a person to the effect that he had seen just such an occurrence, and that there was no external evidence of fire, powder, or smoke. There was also evidence of actual tests made with the revolver which caused the death of Griffin, showing that a shot from it would burn cotton batting but slightly, if at all, more than three or four inches away, but would produce powder marks on tissue paper twelve or fourteen inches away. There was no evidence to create even a suspicion that any human agency was concerned in firing the shot which killed Griffin, other than that of himself.

Now, looking at the circumstances and evidence related, leaving out of view all evidence tending to show motive for self-destruction, because there was ample room to find both ways on that subject, can an appeal to common sense and common experience, as to where the truth lies, result in any other response than that Griffin committed suicide? That is the question. If it may reasonably be answered in the negative, the judgment appealed from cannot be disturbed.

It is said that the legal presumption is that the circumstance ²²³ which caused Griffin's death was the result of accident or some outside human agency, and that is true. But it is a rebuttable presumption and easily yields to physical facts clearly inconsistent with it. The highest crime known to the law may be established, overcoming the legal presump-

tion of innocence, by circumstantial evidence alone; and so may an essential fact, and more easily, within the rules of law and of reason, in a civil case. What circumstances were there here to support the presumption of accident or outside agency? None resting in reason, must be the answer. We say that confidently. Different minds cannot reasonably come to different conclusions from the evidence on that subject. The fact, established with as much certainty as one can be by circumstantial evidence, that there was no one in the room with Griffin when the shot was fired, and that it did not come from outside the building, overcomes the presumption of human agency other than that of Griffin, so as to leave no reasonable hypothesis upon which it can stand. The further fact, established with the same certainty, that the pistol was held at right angles with the head when discharged, and that the deceased was standing upright, as indicated by the manner in which he lay when found, destroys utterly the presumption of accident because of the impossibility, say nothing of improbability, of the firearm getting, by any other means than that of design, into the requisite position to cause the wound as it was caused. So all presumptions in plaintiff's favor are rebutted by the physical situation. True, Mrs. Griffin testified that all was calm in the household when she left the room; that she and her husband had passed a pleasant evening playing cards; that when she left the room there was nothing unusual in her husband's conduct, and that he did not have his hat on; but that is so overcome by the undisputed facts and facts established beyond controversy—notably, that when Griffin was discovered after the shooting his hat was on the ²²⁴ floor between his outstretched legs, that unusual noises were heard in the Griffin apartments, indicating excitement on the part of the occupants from just before Mrs. Griffin left the room till the shot was fired, that she left her kitchen in a state of excitement and fright, which increased when the shot was fired, the situation and her condition causing her to exclaim, "He shot the revolver, I am afraid he has shot himself," or words to that effect, and her subsequent conduct—as to produce conviction to a moral certainty that her description on the trial of the condition of things in her kitchen when she left it is not true. The fact in that regard was established so conclusively as to leave no ground for a reasonable inference to the contrary. All the reasonable probabilities are one way.

What have we left but a multitude of circumstances, all pointing to and consistent with the theory of suicide and inconsistent with any other reasonable theory? Nothing that can be found in the record, in our judgment. If it could be said that the evidence does not point that way so strongly, but that there is yet room for a reasonable inference inconsistent with it, the case was for the jury, and since the trial court, who saw the witnesses and heard all the testimony, decided that there was such room, this court should lean toward supporting that decision in a case of fair doubt on the question: *Powell v. Ashland etc. Co.*, 98 Wis. 35; *Hennessy v. Douglas Co.*, 99 Wis. 129; *Dewey v. Chicago etc. Ry. Co.*, 99 Wis. 455. Neither of such circumstances exists here. The jury could not have said, as men, that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore, it was not permissible for them to say it as jurors and have that stand as a verity in the case. The court should have granted the motion to direct the verdict, and, failing in that, should have set the verdict aside and granted a new trial.

225 We are not unmindful of the fact that there are numerous adjudications in cases of this kind where there is reason to say that courts have allowed a finding to be made by a jury and to stand on mere conjecture in regard to death having been produced by some other circumstance than that of suicide, seemingly overlooking the salutary rule that there is a limit beyond which a jury cannot go—the line of reasonable probability—and that such rule is as inflexible as any in our jurisprudence: *Hyer v. Janesville*, 101 Wis. 371. Several of the cases referred to are cited to our attention to support the judgment appealed from. The same class of cases were confidently relied on by plaintiff in *Rens v. Northwestern Mut. etc. Assn.*, 100 Wis. 266, but the court declined to follow them. The particular circumstance there relied upon to carry the case to the jury was absence of powder, smoke, or fire marks upon the head. This court, by Mr. Justice Winslow, said: "There is but one reasonable inference that can be drawn from the evidence; that to attempt to draw any other would amount to a pitiable stultification of the reasoning powers." True, there was no autopsy in the *Rens* case, but that is not regarded as materially discriminating the case from this, since the death of Griffin did not occur for a considerable length of time after the wound was received, and the postmortem examination was delayed for some time after that and took place when the condition of

the brain was such as to render a careful examination of it, for evidences of powder and smoke, not very certain to result in discovering the exact truth. Then again, it is in evidence that such an examination is by no means infallible, and the adjudications are to the same effect.

A careful examination of the cases to which we are referred, and which are relied upon to support the judgment, shows uniformly some circumstance or circumstances reasonably inconsistent with suicide which are not found in this case. In *Stephenson v. Bankers' etc. Assn.*, 108 Iowa, 637, ²²⁶ which is probably as strong a case as can be referred to, it was said that the direction of the bullet and position of the body were, or might reasonably be considered, inconsistent with the theory that the deceased fired the shot. In *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221, 33 Am. St. Rep. 923, absence of powder marks under the peculiar circumstances of the case was deemed sufficient to carry the case to the jury, relying on 3 Wharton & Stille's Medical Jurisprudence, fourth edition, section 287, as to the probable appearance of gunshot wounds where a shot has been fired with the muzzle of the gun in close proximity with the body. Experience shows and adjudged cases as well, as before indicated, that the Wharton theory is not very reliable in case of a shot being fired by a modern revolver. In *Beckett v. Northwestern etc. Assn.*, 67 Minn. 298, the body of the deceased was found in an out of the way place where he might easily have been murdered by some person, and then his body so arranged as to indicate self-destruction. We could go on through all the cases cited and show that while the courts, in some of them at least, appear to have permitted conjecture to prevail over reason, in no case do the facts point to suicide so as to exclude every other reasonable hypothesis as clearly as in the one before us.

We have discussed the question for decision at much greater length than was necessary in order to reach a satisfactory conclusion and state clearly the reasons therefor, but the subject is of sufficient importance to render all that has been said quite proper. It is considered that the evidence shows that Griffin intentionally destroyed his life, that such fact appears with such clearness as to leave no room for any other reasonable hypothesis, that the motion for the direction of a verdict should have been granted, and, failing in that, the court should have set aside the verdict and granted a new trial. In reaching this conclusion full effect has been given to all legal pre-

sumptions in plaintiff's favor, and the rule that the burden of proof was on the defendant ²²⁷ to satisfy the jury, by a preponderance of the evidence, that Griffin died by suicide. The judgment must be reversed and the cause remanded for a new trial.

By the Court. So ordered.

WINSLOW, J., DISSENTED. "I respectfully dissent in this case," said he, "because I think the circumstances shown by the evidence are fully as consistent with the theory of accidental shooting as with the theory of suicide, and, if such be the case, the law is well settled that the legal presumption is against suicide, and must prevail. With all deference to the opinion of the court, I must be allowed to say that there are important facts in the case which are not stated in that opinion. Some of these facts I will briefly state. In the first place, there was substantially no evidence of a previous suicidal intent. The deceased had never made a threat of suicide, so far as the evidence shows, nor does it appear that there was any substantial cause for unhappiness or despondency on his part. It is true that one witness testified that at some time in 1894, before the marriage of the deceased, he asked the witness if she thought life was worth living, and that he then appeared despondent; while another witness says that he seemed despondent in December, just before the shooting, but the remoteness of the first-named incident, in point of time, as well as the utter absence of any other testimony indicating any thought of suicide, deprive it of any substantial weight, especially in view of the fact that there is considerable evidence given by his familiar friends to the effect that he had no financial troubles, and that he was always good-natured and happy, even up to the very day of the shooting. Certainly it cannot be said that suicidal intent or any reasonable cause for suicide appeared in the evidence. While not by any means controlling, absence of motive or previous suicidal intent is always an important consideration.

"Again, the condition of the pistol with which the shot was fired is not adverted to in the opinion of the court. The pistol was brought into court, and was sent up with the record. It was a cheap self-cocking revolver, called the American bulldog. By reason of some defect in its mechanism, the cylinder would easily turn in either direction while the hammer was down, so that the hammer would rest upon a loaded cartridge. When so turned, it seems unquestionable that, if the hammer was struck, the pistol would be discharged. The hammer was a projecting one, and if the pistol fell, the chances of the hammer striking and exploding the cartridge upon which it might be resting seem to me very great. Now, it appears by the testimony of Mrs. Burgraff, who lived below, that just before the shot she heard 'a quick racket, as if some one had run against something like a chair,' and the witnesses who first

came into the room after the shot all testify that there was a chair close to the deceased, partly overturned. These two pieces of testimony seem to fairly demonstrate that some accident happened with the chair before the shot. Did the deceased stumble over it or against it? We do not know. But certainly the theory that he did so would have strong evidence in its support. Now, if he did so while taking the revolver from his pocket to put in the commode before going to bed (as the evidence showed his custom was), does it not appear entirely possible and probable that it might have fallen and struck the hammer upon some part of the chair, and so discharged it?

"Another fact comes in here. The evidence shows, without substantial contradiction, that the revolver was not held close to the head, but at least a foot from it. This is in part shown by the evidence of the physicians who performed an autopsy and removed the brain. They agree that there were no marks of powder or discoloration from burning in the brain, and they also agree that, if the pistol was pressed close against the skull, there must be such marks. The expert witness called by the defendant does not dispute this proposition. The fact is undisputed that there were no powder marks or burns on the face. The remaining cartridges were afterward fired from the pistol, and it was found that, at a distance of a foot or fourteen inches, tissue paper and cotton batting would be powder burned. The conclusion is inevitable that the pistol, when it exploded, was more than one foot from the face. Now, it is believed that in case of deliberate suicide, the unhappy actor is far more likely to press the pistol against a vital part, in order to make sure work, than to hold it awkwardly at a distance. But in this case the pistol was undoubtedly at a distance; and can it be said that it is more likely that it was held by the deceased at a distance, and deliberately fired, than that the deceased, by some mischance, fell over the chair, dropped the revolver, and that the hammer struck and exploded it accidentally? The fact that the bullet entered the head at right angles throws little light upon the question. It is a circumstance, of course, to be considered by the jury, but not controlling. It is not demonstrated by the evidence that the man was standing when the ball was fired. He may have been partly down, or falling, and no one is wise enough to be able to say that his head could not have been in the proper position to receive the shot in the way in which it was received, if it were accidentally fired. Again, all the testimony of Mrs. Griffin as to what took place in their rooms that evening before the shot was fired, which tends to rebut the theory of suicide, is rejected as false. I shall not go over it in detail, but simply say that, to my mind, it is entirely credible, and is not so completely overcome by the other evidence, or the inferences to be drawn from such other evidence, that the court can say that it must be rejected as incredible."

The learned judge therefore considered that the case was a proper one for the jury, and could not agree that the unquestioned presumption of accidental death was so negatived by the evidence in the case as to justify the court in taking the case from the jury. In support of these views he cited *Home Benefit Assn. v. Sargent*, 142 U. S. 691; *Stephenson v. Bankers' Life Assn.*, 108 Iowa, 637; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155.

DEATH BY SUICIDE—PRESUMPTION AGAINST.—If the death of an insured person has occurred in an unknown manner, the presumption is that it was from a natural or accidental cause, and not from an act of self-destruction: Note to *Meadows v. Pacific Mut. Life Ins. Co.*, 50 Am. St. Rep. 442.

DEATH BY SUICIDE—PROOF OF.—If suicide is relied upon as a defense to an action on a policy of life insurance, and the evidence is wholly circumstantial, it must be of such character as to exclude, with reasonable certainty, any other cause of death: Note to *Hale v. Life etc. Inv. Co.*, 52 Am. St. Rep. 618.

TRIAL—DIRECTING VERDICT.—If the evidence, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant: Note to *Hite v. Metropolitan St. Ry. Co.*, 51 Am. St. Rep. 561.

VEITCH v. CEBELL.

[105 WISCONSIN N, 260.]

GARNISHMENT—DAMAGES FOR.—Although a principal defendant has been injured by having his funds tied up in a bank by garnishment proceedings, he is not, after the dismissal of the complaint and upon the trial of the garnishee action, entitled to a judgment for damages against the plaintiff, by reason of the garnishment, where the statute does not authorize such a judgment.

Frawley, Bundy & Wilcox and T. F. Frawley, for the appellants.

James Wickham, for the respondent.

261 CASSODAY, C. J. This action was commenced against the defendant Cebell, April 30, 1898, to recover \$2,000 on a land contract. On the same day the defendant bank was garnished. The bank answered to the effect that it had on deposit to the credit of Cebell \$5,698.93. On June 15, 1898, the plaintiffs released from the lien of the garnishment \$2,198.93 of the moneys so on deposit, and the balance of \$3,500 remained on deposit subject to such lien until November 25,

1898, when the same was released from such lien by reason of the rendition of a judgment against the plaintiffs and in favor of Cebell in the original action, dismissing the complaint. On February 28, 1899, the garnishee action was tried, and at the close thereof the court found in effect the facts stated, and also that Cebell had been damaged by being deprived of the use of the money so tied up in the bank by such garnishment in the sum of \$123.33, and, as conclusions of law, that Cebell was entitled to judgment against the plaintiffs for such damages, besides the costs of such action, to be taxed, and ordered judgment to be entered accordingly. From the judgment so entered in favor of Cebell for \$123.33 damages and \$36.75 costs, the plaintiffs bring this appeal.

The statute required the garnishee summons to be served on Cebell as principal defendant, as well as on the garnishee: Stats. 1898, sec. 2756. It also authorized Cebell, as such principal defendant, to defend the proceeding against the garnishee, as he did: Stats. 1898, sec. 2765. The statute also provided that, "if the defendant [in the principal action] have judgment, the garnishee action shall be dismissed with costs": Stats. 1898, sec. 2766. The subsequent part of that section does not modify the part of the section already quoted, but relates to the action of ²⁶² the court in respect to the property in the hands of the garnishee, or his liability as garnishee. The statute also provided, among other things, that "if, in the action against the principal defendant, the plaintiff shall be nonsuited or discontinue his action, or if on the trial in such action nothing shall be found due from the defendant to the plaintiff, then in each of these cases the garnishee shall recover costs against the plaintiff and no such costs shall be paid by the defendant": Stats. 1898, sec. 3724. No other provision of the statute has been cited as regulating the entry of judgment in the garnishee action in favor of the principal defendant and against the plaintiff, and we find none. In cases of arrest and bail, replevin, attachment, injunctions, ne exeat, and receivers, the statutes make express provisions to compensate the defendant for any damages sustained: Stats. 1898, secs. 2692, 2720, 2732, 2747, 2748, 2778. But no such provision is made in case of garnishment. The defendant Cebell was at liberty to save himself from any damage by giving the undertaking required by statute, but he failed to do so: Stats. 1898, sec. 2771. The proceedings by garnishment are statutory: McDonald v. Vinette, 58 Wis. 619; Morawetz v. Sun Ins.

Office, 96 Wis. 178, 65 Am. St. Rep. 43. Since there is no statute authorizing such judgment for damages against the plaintiff and in favor of Cebell in the garnishee action, it is obvious that such judgment must be sustained, if at all, upon some principle of common law. The only remedy, if any, for a principal defendant whose funds are thus improperly tied up by garnishment would seem to be in an action for malicious prosecution: Noonan v. Orton, 30 Wis. 356; Board etc. v. Stahl, 48 Wis. 593; Murphy v. Martin, 58 Wis. 279; Gundermann v. Buschner, 73 Ill. App. 180. This last case is directly in point, and it was there held that "a detention of the funds of a defendant by garnishment is such an interference with his property as will sustain an action for damages, when malice and want of cause are shown." As no such showing in behalf of Cebell was ²⁶³ made in this action, it is manifest that the judgment in his favor was unauthorized.

By the Court. The judgment of the circuit court is reversed and the cause is remanded for further proceedings according to law.

ATTACHMENT—DAMAGES.—That an action to recover damages for a wrongful or malicious attachment can be maintained, see monographic note to Tisdale v. Major, 68 Am. St. Rep. 267, discussing the subject.

HOFFMAN v. DIXON.

[105 WISCONSIN, 515.]

SALES—EXPRESS WARRANTY—FORM.—No particular form of expression or words is necessary to make an express contract of warranty, and the word "warranty" is not necessary to it.

SALES—EXPRESS WARRANTY—WHAT CONSTITUTES. An affirmation of the fact as to the kind or quality of an article offered for sale, of which kind or quality the vendee is ignorant, but upon which affirmation he relies in purchasing the article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject.

SALES—BREACH OF CONTRACT.—A DEALER is answerable for breach of contract when he sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false, but relying upon them as true.

SALES—EXPRESS WARRANTY—RAPE SEED.—If a purchaser calls at a store for rape seed, of which he is ignorant, and wild mustard seed is sold to him as rape seed, which he accepts,

to his injury, relying upon the fact that the seed sold to him is rape seed, the vendor is liable in damages for a breach of warranty, whether he knew that the seed were rape seed or not.

Action to recover damages for a breach of warranty. The plaintiff, a farmer, sent his son to the defendant's country store to buy some rape seed. The merchant kept seed for sale. The son asked a clerk if they had rape seed for sale. The latter replied that they had, and weighed out the amount desired in the son's presence. Neither the son, the clerk, the defendant, nor the plaintiff knew rape seed from wild mustard seed, which the article sold proved to be, and each was wholly unaware of the ignorance of the others. The son purchased the seed relying upon the fact that they were sold to him as what he called for, and the plaintiff used the seed relying upon the fact that they were sold as rape seed. The wild mustard seed befouled the plaintiff's land to his injury. A nonsuit was granted and the plaintiff appealed.

Peter Fisher and O'Connor, Hammel & Schmitz, for the appellant.

Quarles, Spence & Quarles, and W. C. Quarles, for the respondent.

³¹⁶ MARSHALL, J. The learned circuit judge, in granting the nonsuit, followed *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215, and a few other authorities in this country in harmony therewith, most of such authorities being decisions of the supreme court of Pennsylvania to the effect that, in the sale of an article, with opportunity on the part of the vendee to inspect it before purchasing, the vendor being neither the manufacturer nor producer of such article, the maxim *caveat emptor* applies both as to the quality and identity thereof. The *Seixas* case was decided in 1804. Kent, J., who wrote the opinion, grounded the decision on *Chandelor v. Lopus*, Cro. Jac. 4, decided in 1603, where it was held that if a person sell a thing for what it is not, falsely but innocently ³¹⁷ misrepresenting its species, no action will lie against him to make good his representations. The case was this: The plaintiff sold a jewel, affirming as a fact, in order to make the sale, that it was a bezoar stone, which it was not. It will be noted that the doctrine of that case is directly contrary to the modern rule that he who falsely affirms the existence of a material fact in regard to an article offered by him for sale, for the purpose of making a sale thereof, which affirmation is relied upon without negli-

gence by the purchaser, to his damage, is guilty of an actionable fraud. As was said by this court in effect, in *Cotzhausen v. Simon*, 47 Wis. 103, if representations by a vendor be material and false, and the vendee rely upon them to his injury, he may recover of the vendor on the ground of fraud the damages he sustains thereby which are the natural and proximate results of the wrong; and such is the case whether the falsehood be willful or not, for a vendor has no right to make even a mistake in facts material to a contract except under penalty of responding in damages. The law is quite as well settled in this state contrary to the ancient rule upon which the *Seixas* case was decided, on the subject of whether the positive assertion of a fact, made to induce a sale, may constitute a warranty, as that it may an actionable fraud, regardless of any element of intentional wrong: *Austin v. Nickerson*, 21 Wis. 542 [549].

This opinion might be extended to great length by a review of the cases on the subject under consideration, but we shall forego any long discussion of the matter. The *Seixas* case was overruled in *Hawkins v. Pemberton*, 51 N. Y. 198. The law as there stated has been since followed in New York: *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13. In the *Hawkins* case it was said that the court in *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215, followed *Chandelor v. Lopus*, Cro. Jac. 4, the doctrine of which being that a mere affirmation as to the character or quality of goods sold will not constitute a warranty, and that such doctrine has ³¹⁸ been long since overruled in this country and England: Citing *Hilliard on Sales*, 237; 2 *Kent's Commentaries*, Comstock's ed., 633, note a; 2 *Smith's Leading Cases*, 5th Am. ed., 238; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Stone v. Denny*, 4 Met. 151. The following cases will show that the doctrine of *Chandler v. Lopus*, Cro. Jac. 4, is not recognized as good law by the English courts: *Allen v. Lake*, 83 Eng. Com. L. 560; 18 Q. B. 560; *Barr v. Gibson*, 3 Mees. & W. 390; *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Bridge v. Wain*, 1 Stark. 505; *Power v. Barham*, 4 Adol. & E. 473. In *Allen v. Lake*, 83 Eng. Com. L. 560, 18 Q. B. 560, there was a sale of turnip seeds as *Skirving's Swedes*. The plants grown from such seeds were of a kind other than the variety known as *Skirving's*. The question presented was whether the sale of the seed as being of a particular kind constituted a warranty, and on that *Coleridge, J.*, said, in substance, that the statement regarding the kind of seed sold,

which accompanied the sale, was a warranty, not a mere representation; that if it were limited to an assertion that the seed was turnip seed, it would, without doubt, constitute a warranty of the seed being turnip seed; and on the same principle, the assertion that the seed was turnip seed of a particular kind was an undertaking that it should answer that description. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, referred to that as the modern and correct doctrine, it being there said that, "a dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described; and this constitutes a warranty."

With but few exceptions, which we shall not take time or space to refer to specifically, the judicial authorities and the text-writers as well are in harmony with the foregoing: *Biddle on Warranties*, sec. 108. That rule is just. It holds a dealer responsible for breach of contract when he sells a thing as being of a particular kind if it does not answer the ³¹⁹ description, the vendee not knowing whether the vendor's representations are true or false, but relying upon them as true. There is no good reason why a dealer should be permitted to exhibit seed to his customers, asserting it to be rape seed when it is something else, and then protect himself from the consequences of his falsehood by a plea of ignorance. The injury by the deception is just as great whether it be willful or innocent. The customer has the same right to rely upon the representation in the one case as in the other. Knowledge on the part of the vendor is not essential either to actionable fraud or a contract of warranty. Applying the principle stated to the facts of this case, What was the contract between the parties? Upon what did their minds meet? The answer must be, that the defendant would sell to the plaintiff rape seed and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not being chargeable with negligence because he did not know. In such a case the doctrine of implied warranty does not apply, but the doctrine of express warranty does. No particular form of expression or words is necessary to make an express contract of warranty.

The word "warranty" is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject. In Benjamin on Sales, 6th ed., 623, 625, as conclusions from a review of authorities in this country and England, including the New York cases overruling *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215, it is said: "All agree that any positive affirmation ³²⁰ of a material fact as a fact, intended by the vendor as and for a warranty, and relied upon as such, is sufficient" to constitute a warranty. "The better class of cases hold that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not." The latter is the doctrine of this court, as indicated by numerous cases where it has been applied: *Austin v. Nickerson*, 21 Wis. 542 [549]; *Giffert v. West*, 33 Wis. 617; *Neave v. Arntz*, 56 Wis. 174; *White v. Stelloh*, 74 Wis. 435.

It follows from the foregoing that the decision of the trial court that the doctrine of caveat emptor applies to the facts of this case, and that the evidence does not justify a finding that the defendant warranted the seed to plaintiff to be rape seed and that he was entitled to recover for a breach of it, was erroneous, and the nonsuit was improperly granted.

By the Court. The judgment of the circuit court is reversed and the cause remanded for a new trial.

SALES—EXPRESS WARRANTY.—NO FORM of words is essential to constitute an express warranty in the sale of chattels: *Kircher v. Conrad*, 18 Am. St. Rep. 731. It is sufficient if the words used were made and accepted as a warranty: *Note to Hexter v. Bast*, 11 Am. St. Rep. 879. The word "warranty" is not necessary to create a warranty in a sale: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753.

SALES—PARTICULAR DESCRIPTION—WARRANTY.—The sale of a chattel by a particular description is a warranty that the article sold is of the kind specified: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753; *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783. A statement made in good faith at the time of sale by the vendor that seed are of a certain kind, such seed, with respect to kind, not being ascertainable by inspection, will lay a ground from which a jury or a court having power to pass upon the facts may infer a warranty as to kind: *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425.

PABST BREWING COMPANY v. MELMS.

[105 WISCONSIN, 441.]

PARTITION—ESTATE IN REMAINDER.—Partition cannot be enforced where there is no joint possession to be divided and the plaintiff has the sole right of possession of the entire premises. Hence, an owner in fee of an undivided seventh of real estate and of a life estate in the other six-sevenths cannot maintain an action for partition against those who own the remaining six-sevenths in remainder, subject to such life estate.

Winkler, Flanders, Smith, Bottum & Vilas, for the appellant.

Bloodgood, Kemper & Bloodgood, and Francis Bloodgood, for the respondents.

442 WINSLOW, J. The plaintiff brings an action for the partition of real estate, alleging ownership in fee of an undivided one-seventh thereof, and a life estate for the life of another in the remaining six-sevenths; also, that each of the six defendants owns an undivided one-seventh in fee, subject to such life estate. A general demurrer to the complaint was sustained, and the plaintiff appeals.

The demurrer was rightly sustained. Our statute provides (Stats. 1898, sec. 3101): "All persons holding lands as joint tenants or tenants in common may have partition thereof by civil action in the manner provided in this chapter. Such action may be maintained by any person who has any estate in possession of the lands of which partition is sought, but not by any one who has only an estate therein in remainder or reversion." The object of this statute was plainly to settle and obviate the disputes and difficulties attending the joint occupancy of lands, and to sever the undivided possession, so that each person entitled to such possession should thereafter have a right to the sole possession of a certain part of the property, instead of a general right with the other cotenants to the possession of the whole. Such was the object and purpose of the English statutes of partition. Under those statutes no one could enforce partition unless he had an estate in possession, as one of the cotenants thereof: Freeman on Cotenancy and Partition, 2d ed., secs. 440, 446; Seiders v. Giles, 141 Pa. St. 92. The law was so stated by this court in Morse v. Stockman, 65 Wis. 36-44, and the authorities were there collated. Our statute goes no further than this. The partition statute of Michigan is almost identical in its lan-

guage, and has received this construction: *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617. See, also, *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795; *Hunnewell v. Taylor*, 6 Cush. 473.

In the present case there is no joint possession to be divided. The plaintiff has the sole right of possession of the ⁴⁴³entire premises. There are no cotenants in possession, or entitled to possession, so long as the life estate remains in esse. There being no cotenancy in possession, the only joint or common interest between the plaintiff and the defendants is that existing between them as remaindermen or reversioners. By the express terms of the statute, a remainderman or reversioner cannot in that capacity maintain the action.

It is true that in some states it has been held that statutory actions for partition may be brought by remaindermen: *Scoville v. Hilliard*, 48 Ill. 453; *Cook v. Webb*, 19 Minn. 167; *Smith v. Gaines*, 38 N. J. Eq. 65. But these decisions were all based upon statutes entirely different from ours, and placed upon the ground that the statutes expressly or impliedly authorized the maintenance of such actions. This consideration renders any discussion of such cases unprofitable.

By the Court. Order affirmed.

PARTITION—WHO MAY SUE.—Under the Oregon code, the right to sue in partition is given only to one having the actual or constructive possession of the land sought to be partitioned: *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795. That the plaintiff must show a tenancy in common with the defendants, see monographic note to *Nichols v. Nichols*, 67 Am. Dec. 704, on who may compel partition.

PARTITION OF ESTATES IN REMAINDER cannot be compelled unless specially authorized by statute: *Deshong v. Deshong*, 186 Pa. St. 227, 65 Am. St. Rep. 855, and note. A tenant in fee of an undivided interest cannot maintain a suit for partition against a remainderman: See monographic note to *Aydlett v. Pendleton*, 32 Am. St. Rep. 779, on the partition of contingent or future conditional interests in land.

COWDERY v. HAHN.

[105 WISCONSIN, 455.]

SURETYSHIP—MATERIAL ALTERATION OF CONTRACT—DISCHARGE OF SURETIES FROM LIABILITY.—If the obligee of a bond, given by sureties for the faithful performance of a building contract, pays the contractors the entire amount of the contract price, when more than twenty per cent thereof is not due, there is such a material alteration of the contract, without the consent of the sureties, as to discharge them from liability.

Action by Cowdery to recover against Hahn and another as sureties on a bond given by them to Cowdery for the faithful performance of a building contract, which provided that fifteen per cent of the value of material and labor furnished should be retained until the contract was wholly fulfilled. The contract price was three thousand six hundred and seventy-five dollars, which amount Cowdery paid to the contractors, without the consent of the sureties, and at a time when two hundred and seventy-five dollars' worth of the work was still unfinished, to the knowledge of Cowdery. The building was completed by the contractors, after such payment, but, in violation of their agreement to protect the owner from all subcontractors' liens, they failed to pay a large number of subcontractors, who thereupon foreclosed liens upon the building, judgments for which were paid by Cowdery, who brought this action to recover the amounts so paid. There was a judgment against the sureties, from which they appealed.

McElroy & Eschweiler and W. J. McElroy, for the appellants.

Miller, Noyes, Miller & Wahl and George H. Noyes, for the respondent.

457 WINSLOW, J. The question is, Did Cowdery, by paying the contractors the entire amount of the contract price of the building before it was due, materially alter the contract so as to discharge the sureties? Upon principle and authority, this question must be answered in the affirmative. In **458** *Stephens v. Elver*, 101 Wis. 392, the principle was recognized that the surety, under such circumstances, is discharged, if the principal is paid faster than the contract provides, but that the premature payment must be substantial in amount, and not a mere trifling deviation from the contract.

In the contract before us, only eighty-five per cent of the materials furnished and work done was to be paid during the

progress of the work, and the remainder after the contract was fulfilled. The entire contract price was paid by Cowdery at a time when two hundred and seventy-five dollars' worth of the work (which must be considered a substantial part thereof) was still unfinished, to the knowledge of Cowdery. Not only was the two hundred and seventy-five dollars not then due, but fifteen per cent of the remainder of the contract price had not then become due, so that in all nearly eight hundred dollars was paid upon the contract long before it was due.

The payment of this sum to the contractor before it was due must be regarded as amounting to a substantial modification of the contract by the principals without the consent of the sureties, and hence, upon familiar principles, relieves them from liability: See authorities cited in *Stephens v. Elver*, 101 Wis. 392. The sureties were thus, without their knowledge or consent, deprived of a substantial inducement which the principals would otherwise have had to fulfill their contract to the letter.

By the Court. Judgment reversed and action remanded, with direction to render judgment on the verdict for the defendants.

SURETYSHIP—DISCHARGE OF SURETIES.—ANY MATERIAL ALTERATION or change in the terms of a contract by the original parties will discharge the sureties thereon from liability: *Notes to Scott v. Fisher*, 28 Am. St. Rep. 691; *Price v. Dime Sav. Bank*, 7 Am. St. Rep. 372; *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458.

HARRINGTON v. PIER.

[105 WISCONSIN, 485.]

CHARITIES ARE TO BE FAVORED.—Gifts to charitable uses should be highly favored, and construed by the most liberal judicial rules that the nature of each case, as presented, will admit of, rather than that the gift shall fail and the intent of the donor not be accomplished.

WILLS—EQUITABLE CONVERSION—DOCTRINE OF, APPLIES, WHEN.—If there is a positive direction in a will to convert the real property into personalty, or there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or if the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal

with the estate as personal property from the time the will takes effect.

WILLS—EQUITABLE CONVERSION—ILLUSTRATION.—If a will requires the executrix to convert the real property of the testatrix into money and to distribute the entire estate as personal property in the manner indicated therein, the doctrine of equitable conversion applies, irrespective of the validity of a bequest in the will to promote the cause of temperance, where the entire scheme of the will shows that the testatrix intended to dispose of all her property thereby, and that it should be dealt with solely in the form of money; where the condition of the estate shows that the blending of real and personal property was contemplated for every purpose mentioned in the will, including a final division of the net proceeds, and where the direction to convert the entire estate into money was not merely in aid of, or merely to accomplish, a particular purpose named, but was for all the purposes of the testatrix's scheme, no one of which can be carried out according to the manifest intent unless the conversion directed takes place.

CHARITIES—GIFTS OF PERSONAL PROPERTY.—THE STATUTES of Wisconsin, prohibiting perpetuities and regulating uses and trusts, have no application to gifts of personal property for charitable purposes. A good charitable use is public, and, under the established doctrine of that state, trusts for charitable uses are distinguished from private trusts.

CHARITABLE USES—TRUST FOR—WHAT DOES NOT MILITATE AGAINST.—Indefiniteness of beneficiaries who can invoke judicial authority to enforce a trust for charitable uses, a want of a trustee if there is a trust in fact, indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of the mode of carrying out the particular purpose, does not militate against the validity of such a trust.

CHARITABLE USES—TRUST FOR—WHEN GOOD.—A trust for charitable uses is good, with or without a trustee, if there is a particular purpose, such as education or relief of the poor, as distinguished from a bequest to charity generally, and a class, great or small, to be benefited, without regard necessarily to location, as "worthy indigent females," or "indigent young men studying for the ministry," or "resident poor," or "indigent children of Rock county," or "the boys and girls of California."

CHARITIES ORIGINATED BEFORE THE STATUTE OF ELIZABETH.—The common-law system of charities did not originate with, nor was it dependent upon, the statute of 43 Elizabeth, chapter 4.

CHARITIES INCLUDE WHAT CHARACTER OF WORK.—A charity, with respect to the character of work to be performed, includes everything that is within the letter and spirit of the statute of Elizabeth, considering such spirit to be broad enough to include whatever will promote in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons from among the people as a whole, or a designated class thereof.

CHARITIES—DEFINITENESS AS TO PURPOSE.—A public charity is sufficiently definite as to purpose, when there is a particular charitable purpose, the general nature of which is clearly stated. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

CHARITABLE TRUST.—THE PROMOTION OF “TEMPERANCE WORK,” in a designated city, is a proper subject for a charitable trust, and is not void for uncertainty of purpose where the term obviously means work to prevent, so far as practicable, the use of intoxicating liquors.

Action brought by Harrington and others against Pier, executrix, and others, to obtain a construction of the will of Elizabeth Ann Sutton. The will disposed of both real and personal property, but the latter was much less than sufficient to pay the expenses of administering the estate, the funeral expenses, and debts of the deceased. Certain articles named were willed to specified persons, and the executrix was directed to convert the real estate into money. She was also directed to pay three-fourths of the net estate left after the payment of debts, funeral expenses, and expenses of administration, to trustees named, to be used or expended by them as stated in the opinion. A bequest was made to residuary legatees named. The only heir was Sarah Parker, who died subsequently to the death of the testatrix, leaving as her sole heirs certain persons named, who were parties to this action. The trial court decided that the direction in the will requiring a conversion of the real estate into money was made for the sole purpose of carrying out the trust provisions of the will; that such trust provisions were void for uncertainty; that the three-fourths of the testatrix's property bequeathed to trustees for the promotion of temperance descended to the heir named as undisposed of property; and that the heirs of Sarah Parker were entitled to the same. A judgment was rendered accordingly, from which the executrix and the trustees appealed. The residuary legatees appealed from that part of the judgment which was adverse to them.

Nickerson, Roemer & Aarons and H. W. Nickerson, for the residuary legatees.

Fish, Cary, Upham & Black and A. L. Cary, for the trustees.

E. G. Comstock, for the executrix.

Toohey & Gilmore and John Toohey, for the respondents.

490 MARSHALL, J. The vital question presented for adjudication on this appeal is, Is the bequest to trustees to promote temperance work in the city of Milwaukee void for uncertainty? That involves the consideration of several cases where the important questions involved have been decided by

this court, but without such a strict adherence to a definite judicial policy in each case and reasons given for the conclusions reached that it can be said, even at this late day, that we have an established system, based on entire harmony of judicial decisions, by which trusts for charitable purposes can be tested when their validity is challenged. The importance, always recognized, of protecting the individual right of every person to devote his private fortune to the public good so far as practicable without the violation of any legal principle, and of making all efforts to that end effective to accomplish the donor's purpose, cannot be overestimated. Few things occur in the administration of justice more lamentable than the occasional strangling of some wise and noble purpose to devote the savings, or part of them, of a life of industry, to the upbuilding of the human race at some point or in some field, and the diversion of what was intended for some public benefit to private use, directly contrary to the will of him whose last days were solaced with the thought that his public benefactions would build an enduring monument to his memory in the hearts of grateful people, and the hope of eternal rewards for such well-doing believed to be waiting for bestowal. That idea prevailed with the fathers of the common law so far back that neither the memory of man nor judicial records run to the contrary. It became crystallized as a part of the common law of England long prior to the statute of 43 Elizabeth, chapter 4, to the effect that gifts to charitable uses should be highly favored and construed by the most liberal judicial rules that the nature of each case, as presented, would admit of, rather than that the gift should fail, and the intent of the donor fail of accomplishment. The judicial system in regard to such gifts was transplanted to ⁴⁰¹ and became a part of the common law of this country, and it has been so judicially declared in all or nearly all the states, barring the effect upon it of the statute of Elizabeth, except in states where, by statute, such system has been modified or abrogated. Just where this state stands on the question, as before indicated, cannot be stated and the statement supported with that entire harmony of adjudications which should be sought for on a branch of the law of such importance. If that difficulty can be met and existing obscurities cleared up, so far as they affect the case before us, and a conclusion be reached as the result of an established harmonious judicial system entirely consistent in all

its parts, this decision will have a significance far beyond the mere fact of justice done in the particular case.

The doctrine of equitable conversion is of importance on both appeals, but more particularly on the appeal of the residuary legatees. It is deemed best to take up that subject at this point, and it will result in disposing of the appeal of the residuary legatees first.

The will requires the executrix to convert the real property of the testatrix into money and to distribute the entire estate as personal property in the manner indicated therein. In the absence of any circumstances sufficient to do away with the force of that direction, it worked an equitable conversion of the testatrix's real property into personalty, and required the will and every part of it to be treated as if dealing with property of the latter character in law and in effect, as of the death of the testatrix. The rule is, that where there is a positive direction in a will to convert the real property into personalty, or there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or where the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator ⁴⁹² must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect—from the death of the testator: *Chandler's Appeal*, 34 Wis. 505; *Dodge v. Williams*, 46 Wis. 70; *Milwaukee Protestant Home v. Becher*, 87 Wis. 409; *Hunt's Appeals*, 105 Pa. St. 128; *Given v. Hilton*, 95 U. S. 591; *King v. Woodhull*, 3 Edw. Ch. 79; *Rice on Real Property*, 32; 3 *Redfield on Wills*, 141; *Roper on Legacies*, 1st Am. ed., 341. True, a general direction to sell all the real property for some one or more purposes named in a will does not always work a conversion thereof into personalty where a necessity therefor does not exist and there is not a clear intent that at all events the testator's purpose was to distribute his estate as personal property. If it appear that the direction to convert the realty into money was coupled with and to merely effect some particular purpose susceptible of satisfaction by a sale of part of the realty only, or if the bequest for such purpose be void, and the will evidences that the execution of the power of sale was made dependent upon the purpose to be accomplished, the application of the doctrine of equitable conversion of realty

into personalty ends where the absence of necessity for it begins. The mere circumstance, however, that bequests can be satisfied without a full execution of the power of sale, or be coupled with invalid bequests, is not so inconsistent with an intent that the whole estate shall be treated as personal property as to preclude the application of the doctrine of equitable conversion in such circumstances, if that be manifestly necessary to effect the testator's intent gathered from the entire will. As said in *Given v. Hilton*, 95 U. S. 591, the blending of real estate and personal property in one fund for all the purposes of the will is generally regarded as evidencing intent that the whole estate shall be treated as personal property even though a necessity therefor does not exist, but such evidence is not conclusive on the question. The court, in ⁴⁹³ all cases where there is any obscurity, either in the literal sense of the language of the will or the application of such language to the facts, must resort to familiar rules for the judicial construction of such instruments, and when the real thought of the testator, in mind when he made the will, shall have been discovered with clearness, if within the reasonable meaning of the language used to express it, such thought must be held to have impressed the property, of which the testator died seised or possessed, with a character consistent therewith.

The doctrine of equitable conversion, as above stated, is elementary. It has often been applied by this court, particularly in the class of cases to which this belongs, one of the most significant instances being in *Dodge v. Williams*, 46 Wis. 70. The application of it to the will in question, if the bequest to promote temperance be valid, is not contested on either appeal. Such application, in the event stated, is of importance on the theory that the statute of uses and trusts and the prohibition of perpetuities in real estate apply to gifts of real property for charitable uses, but not to personal property. Such theory has much support in decisions of this court. It has been rather taken for granted than directly decided, since *Dodge v. Williams*, 46 Wis. 70. Whether such is the settled law, so as not to be open for discussion, need not be decided in this case. Where a question, affecting property rights, has been judicially settled so long as to have become a rule of property, for the courts to disturb it, even if settled wrong at the start, would be a greater wrong than the original mistake; and in such circumstances the maxim, *Stare decisis, et non quieta movere*, should be pretty rigorously applied. For the purposes of the

bequest in controversy there can be no question but that the entire estate must be dealt with as personal property, and, as we shall show, as to such property at least, it was plainly and correctly decided in *Dodge v. Williams*, 46 Wis. 70, that the statutes of ⁴⁹⁴ perpetuities and of uses and trusts have no application to gifts for charitable purposes. That was as far as the court was called upon to go on the facts in that case. The same is true now. It may be easily gathered from the language of the learned chief justice who wrote the opinion in *Dodge v. Williams*, 46 Wis. 70, that there was considerable doubt on the question as to whether the rule, declared as to personal property, should not be extended to real estate. He showed to a demonstration that the English doctrine of perpetuities was not applied in the place of its origin to public trusts and that if it is so applied here it must be by force of the statute. That such is the rule in most jurisdictions where there is a statute declaratory of the common law, or where the common-law doctrine prevails in this country, will be easily discovered by a review of the authorities outside of this state: *Yard's Appeal*, 64 Pa. St. 95; *Philadelphia v. Girard*, 45 Pa. St. 1; *Lewis on Perpetuities*, 689; *Richmond v. Davis*, 103 Ind. 449; *Perin v. Carey*, 24 How. 465; *Perry on Trusts*, secs. 384, 687, 736; 5 Am. & Eng. Ency. of Law, 2d ed., 902, and cases cited, among which will be found *Dodge v. Williams*, 46 Wis. 70, and *Gould v. Taylor Orphan Asylum*, 46 Wis. 106. Those two cases are out of harmony, as will be seen later, with some things said in *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276; and it will also be seen that whatever conflict there is in subsequent decisions results from the influence of *Dodge v. Williams*, 46 Wis. 70, prevailing at one time, and *Heiss v. Murphey*, 40 Wis. 276, and *Ruth v. Oberbrunner*, 40 Wis. 238, at another. It is not intended at this time to commit the court, in any degree, on the subject of whether the rule in *Dodge v. Williams*, 46 Wis. 70, as to the statute of uses and trusts not affecting testamentary gifts of personal property for charitable uses, applies to such gifts of real estate. The subject is simply referred to in order that the decision in this case, on the subject of the validity of the trust in controversy, shall not be considered as inferentially deciding ⁴⁹⁵ that the trust would be valid if the subject of it were real property instead of personal property. Some return to this subject will be necessary later in this opinion.

On the appeal of the residuary legatees, the question of whether the decision of the trial court, that the direction to convert the real estate into money is dependent upon the validity of the bequest for temperance, is of vital importance as bearing on the question of whether the property, intended to be used to satisfy the void bequest, if there be such, goes to the residuary legatees or passes to the heirs of Sarah Parker, the only heir of the testatrix at the time of her death, as property undisposed of by the will. The trial court took the latter view, and of that the residuary legatees complain, and by their appeal present the controversy in that regard for decision.

The will plainly directs the conversion of all the testatrix's property into money and the distribution of it as such. There is a "blending of realty and personalty," mentioned in *Given v. Hilton*, 95 U. S. 591, as circumstantial evidence of an intent to distribute the entire estate in the form of money. Following the direction to sell the realty and the direction to pay the debts and funeral expenses and expenses of administration is a direction in regard to the distribution of the net proceeds; all indicating, pretty clearly, that the previous directions were to be satisfied out of the testatrix's property generally, after the conversion of it into money. Again, the will provides for a division of the net proceeds, and that a part, on such division, shall go to the residuary legatees mentioned, indicating that such legatees shall take the property only in the form of money. Moreover, as suggested, the debts, funeral expenses, and expenses of administration, which the testatrix must have had in contemplation, were several times more than the personal property, and were directed to be paid out of the proceeds of the property generally. Looking at the will as a whole, and applying it ⁴⁹⁶ to the facts, we cannot discover any reasonable ground for saying that the testatrix directed the conversion of her property into money for the sole purpose of the gift in trust for temperance work. The entire scheme of the will shows that she intended to dispose of all her property thereby, and that it should be dealt with solely in the form of money. The decision in *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106, cited to our attention, does not apply. The evident purpose of the will there was that it should be executed in money as to certain bequests, held by the court to be invalid, and that the residue should go to the beneficiaries named in specie, whether in the form of personal property or realty. Neither does *Read v. Williams*, 125 N. Y. 571,

21 Am. St. Rep. 748, apply. The distinction between such cases and the one before us is clearly marked. In the Read case it was evident that the direction to convert the real estate into money was not made for the purpose of the distribution of the estate, but in aid of a particular purpose named, which failed. The rule was there stated, referred to in *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106, as elementary, that the power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not operate as a conversion where the scheme or purpose fails, by reason of illegality, lapse, or other cause. Here, the general scheme of the testatrix was to distribute her estate as personal property. That has not failed. The direction to convert the entire estate into money was not merely in aid of, or merely to accomplish, a particular purpose named, but for all the purposes of the testatrix's scheme, no one of which can be carried out according to the manifest intent unless the conversion directed takes place.

True, when a testamentary purpose, intended to be carried out by the conversion of real estate into personalty, fails for invalidity or other cause, the doctrine of equitable conversion does not apply, unless a clear intention can be ⁴⁹⁷ collected from the will that the division of the property shall be made in money at all events. We cannot escape, however, the conclusion that such was the testatrix's intent. There is no other reasonable explanation, to our minds, in view of the condition of the estate, of the fact that the will contemplated the blending of real and personal property for every purpose mentioned in it—the payment of debts, expenses of administration, and funeral expenses, as well as the final division of the net proceeds.

The doctrine is invoked on the appeal of the residuary legatees that, "where a devise, otherwise valid, is inseparably coupled with a void devise and is a mere accessory thereto, and the amount of the valid part cannot be ascertained, then both must fall together." We cannot discover any reasonable application of that to this case. The bequest to the residuary legatees is not inseparably connected with the gift to promote temperance, neither is it an accessory to or dependent upon the other in any way. Under such circumstances, by the most familiar rules governing the subject, the failure of one part

of a will for invalidity or other cause does not affect those portions of it otherwise valid.

Having concluded that the entire estate, irrespective of the validity of the bequest to promote the cause of temperance, must be dealt with as personal property, and that, independent of whether the particular bequest mentioned be preserved, the rest of the will must stand, little is left to be considered on this branch of the case. There is no contention but that, generally, void legacies fall into the residuum of the estate and go to the residuary legatees. The only exception is where there is a clear intent manifested by the will to the contrary. The mere fact of making a will is so inconsistent with any other intent than that to provide for a disposition of all the property of the testator, that very strong and clear language is required to show a contrary intent. For that reason a residuary bequest in general terms ⁴⁹⁸ is held to carry void and lapsed legacies. The only circumstance claimed in this case to rebut the legal presumption that the testatrix intended that lapsed legacies should pass under the residuary clause of the will is the circumstance that a specific part of the net proceeds of the property, left after the satisfaction of such claims as would be necessarily preferred without any mention of them, was bequeathed to the residuary legatees, the other portion being bequeathed to trustees. It is said that the net proceeds, so directed to be divided, constitute in fact the residuum of the estate, and that it was divided, a part being bequeathed to such legatees and a part in trust for temperance work, and that under such circumstances the rule mentioned does not apply. True, when a portion of an estate is plainly treated as the residuum, and as such is divided and the several parts separately bequeathed, the failure of one part does not go to increase the amount of the others: *Floyd v. Carow*, 88 N. Y. 560; *Booth v. Baptist Church*, 126 N. Y. 215. But we fail to see any clear application of that to the will before us. The testatrix did not bequeath three-fourths of her net estate in one direction and one-fourth of it in another, treating the net estate as the residue. She bequeathed three-fourths of the net estate in one direction, and "all the rest, residue, and remainder to George Henry Andrews and William Andrews, to be divided between them equally, share and share alike." The term "residue" was used with reference to what might be left of the estate after satisfying the previously declared purposes. The amount of the residuum was not necessarily one-fourth of the

net estate, so called. The testatrix must be presumed to have had in mind, in view of the general language of the residuary clause, that all of her estate that for any reason might not pass under the particular bequests would go to the residuary legatees under the general language of the residuary clause. That is manifest from the whole will. If the testatrix intended to treat the ⁴⁹⁹ net proceeds of her estate as the residue, she would have so indicated by in terms bequeathing three-fourths of it to the trustees for temperance work and one-fourth of it to the nephews mentioned, instead of using the ordinary language generally held by courts to indicate an intent that the residuary legatees are intended to take all property subject to be bequeathed by her, not otherwise effectually disposed of.

We will now take up the subject referred to in the opening lines of this opinion. Is the bequest void for uncertainty of three-fourths of the net estate to trustees, to be used or expended by them, or the survivor of them, as their best judgment shall dictate, in temperance work in the city of Milwaukee, the greater portion to be used for the benefit of Crystal Spring Lodge, I. O. G. T., and the Woman's Christian Temperance Union of said city of Milwaukee, but if either of said organizations decide to erect a building for temperance work in said city of Milwaukee, the whole trust fund then remaining in the hands of the trustees to be used by them in the erection and construction of such building, all of such trust funds to be expended in temperance work within five years from the time of coming into the hands of the trustees?

The precise nature of the uncertainty discovered by the trial court does not appear from the record; but from the arguments of counsel in support of the judgment we assume the case was supposed to be ruled by *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276, and other cases in this court and expressions in opinions which follow the *Ruth* and *Heiss* cases, to the effect that the statute of uses and trusts, and the inability of courts of equity to exercise cy pres power, place trusts for charitable uses on the same basis as private trusts, so that a trust of the former character, not sufficiently definite both as to the charitable scheme and the beneficiaries that it can be enforced by the courts after the manner of private trusts, is void for uncertainty; ⁵⁰⁰ that subdivision 5, section 2081 of the Statutes of 1898 applies, rendering a charitable trust void unless "fully expressed and clearly defined upon the face of the instrument creating it." That

was the New York rule when the cases mentioned were decided and until recently changed by statute, and it was fully sanctioned by this court in such cases. The published syllabus of *Ruth v. Oberbrunner*, 40 Wis. 238, correctly states, in substance, what was said in the opinion. It is as follows: "Section 1, chapter 84, of the Revised Statutes of 1858 abolishes all trusts, including those for charitable purposes, except such as are specifically authorized by that chapter." The view which courts elsewhere have drawn from the two cases mentioned is well illustrated by what was said by the supreme court of Illinois in the recent case of *Hoeffler v. Clogon*, 171 Ill. 462, commenting on the recent case in this court of *McHugh v. McCole*, 97 Wis. 166, which follows closely the reasoning and points decided in the *Ruth* and *Heiss* cases and the New York authorities relied on therein. The following is the view of the Illinois court: "In Wisconsin, all trusts are abolished by statute, except certain specific trusts where there is certainty in the beneficiaries." "The doctrine of charitable uses is not in force." "A trust, to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument." If such is the law of this state, it will not be seriously contended that the bequest in controversy will stand the test and can be preserved, especially as to certainty of beneficiaries, as in case of a private trust.

It is not supposed that a treatment, to any great extent, of the underlying principles of the system upon which this case must stand or fall is necessary. The time has gone by when long discussions of questions touching the origin of trusts for charitable uses as distinguished from private trusts, the jurisdiction of courts of equity over the former, how ⁵⁰¹ they are affected by the statute of 43 Elizabeth, chapter 4, whether the common-law system of charities and the jurisdiction of equity over them is based on that statute or is independent of it, whether without adopting the English statute we inherited its system of trusts for charitable uses divorced from the *cy pres* feature of such statute, the true nature of the *cy pres* doctrine as to whether it means more than the administrative features of such statute, or the exercise of prerogative power strictly so called, and the multitude of other questions that might be mentioned, are necessary or proper. The books are full of judicial discussions of all of these questions by persons showing great learning and depth of research into the sub-

jects. Such subjects have all been so thoroughly settled that we need only refer to conclusions, and harmonize them, so far as practicable, with the adjudged cases in this court, and after blazing out a line clearly by the light of such cases and conclusions, determine how the case before us stands in regard to it.

In *Dodge v. Williams*, 46 Wis. 70, and *Gould v. Taylor Orphan Asylum*, 46 Wis. 106, the cases being represented by eminent counsel on both sides and considered and decided together, they having been so arranged because of the great importance of the questions involved, the decisions in *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276, were pressed upon the attention of the court, to the effect that no trust is valid under the laws of this state, whether charitable or otherwise and whether of real or personal property, unless so created as to satisfy the statutory rule of definiteness laid down in the statute of uses and trusts, at section 2081 of the Statutes of 1898, and the requirements, generally, of such statute. A reference to the briefs of counsel supporting that theory shows that they grounded their arguments on the idea that the doctrine of charitable uses does not obtain to any extent in this state; that a trust not having all the elements of certainty requisite to a private trust cannot be ⁵⁰² sustained without the aid of the *cy pres* doctrine; that a court of equity cannot exercise any authority over a donation to charitable uses; that it cannot in case of a private trust, except by virtue of the prerogative power of the sovereign, the so-called *cy pres* power, and that courts of this state possess no such power. On the other hand, it was contended that the legislature did not intend to abolish the common-law system of trusts for charitable uses, and that they still are lawful and sustainable except where so indefinite as to be incapable of enforcement by the court without the aid of the *cy pres* doctrine, strictly so called, limited to the power, where property is given for charitable purposes generally—given with no declaration of the particular purposes to which it is to be applied or any declaration of a purpose that can be carried out—to ascertain and determine a purpose within the general scope of the donor's intention, or akin to it, and to frame a scheme to effect such purpose and to enforce the execution of such scheme through the medium of a remedy analogous to that given by the statute of Elizabeth on the subject; that the legislative intent was to preserve charitable uses and trusts in all their

essential and distinctive features, so far as they are sustainable, independent of the *cy pres* remedy of such statute, or the exercise of prerogative power strictly so called. The two positions so taken before the court were so inconsistent with each other, the one being based on *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276, and the other opposed to the general doctrine of those cases, not necessarily the decisions rendered, that no middle ground was left on which to harmonize. If one theory was right, the other was necessarily wrong. The subject of the trust was personal property. The trustees named were trustees of several colleges. The uses and purposes declared were payment for the education and tuition of worthy indigent females at such colleges, and, in a particular contingency, for the education, tuition, and support ⁵⁰³ of worthy indigent young men attending and studying for the ministry at one of the colleges named. There was a further bequest, on a specified contingency, to a corporation to be organized to take and administer it as a trustee, as to which the use and purpose declared was the education of worthy indigent females in the manner commonly done at female seminaries. It will be noted that neither of the trusts could well be enforced after the manner of private trusts. There was an entire absence of certainty of beneficiaries who could invoke judicial power to enforce the trust. The broadest discretion was left to the trustees to select the immediate beneficiaries from a class having no limitation as to residence or location, and none as to number, kind, or character, except by the indefinite term, "worthy indigent females," or "worthy indigent young men studying for the ministry." The method of carrying out the declared purpose had no limitation except that of the work done at the several schools named.

The opinion in the case was written by Chief Justice Ryan, who took no part in the first of the former cases, and who appears to have concurred in *Heiss v. Murphey*, 40 Wis. 276, because of the absence of any trust, the bequest being made directly to uncertain and unascertainable devisees. The court, as indicated in the opinion, in terms or in effect, decided as follows: Bequests of personal property to charitable purposes, good by the rules of the common law, except so far as affected by the *cy pres* remedy and doctrine of the statute of 43 Elizabeth, chapter 4, are good under the laws of this state. When it is said that the doctrine of *cy pres* does not prevail in this state, that does not refer to those liberal rules of judicial con-

struction of charitable trusts, by courts of equity, which, prior to the statute of Elizabeth, were applied in chancery, and of which such statute is only confirmatory, but to the prerogative power exercisable where such statute prevails. Courts here, as anciently, look with favor ⁵⁰⁴ upon all donations to charitable uses, and give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules and nature of the case will admit of, within the limits of ordinary chancery jurisdiction, will be resorted to if necessary. It is sufficient if there be a trust and a particular charitable purpose, as distinguished from a gift to charity generally. The court may supply the trustee to administer the trust; the trustee may select the beneficiaries from within the general class named by the donor, and, when necessary, may work out the details of the declared purpose within its stated general limits. Certainty of beneficiaries who can invoke judicial power to enforce the trust is not only unnecessary, but is inconsistent with the very nature of a trust for charitable uses, in that the beneficiaries, in a general sense, are the members of the public at large. A public charity, within the rule mentioned, is sufficiently definite as to purpose if its general nature be clearly stated, or it can be made otherwise certain by the trustees clothed with the power of administering the trust within the limits of the declared purpose. It is sufficiently definite as to immediate beneficiaries by the power of selection lodged expressly or impliedly in the trustee appointed by the donor, or by the court where there is a trust but no trustee. If the trustee abuse his power, there is a complete remedy by the exercise of the visitatorial power of the state. The statute of uses and trusts, as to personal property at least, does not apply to trusts for charitable uses. The New York doctrine and decisions on that question have no force here. For greater certainty as to what is here said, we quote: "Public charities, indefinite in terms, are necessarily limited in their administration by the amount of the foundation. Where the founder does not provide a rule or order of selection, there is, therefore, in every public charity, a necessary power of selection of beneficiaries in the trustee. If the power is abused, the state, ⁵⁰⁵ in the exercise of its visitatorial power, will correct it." "When a trust defines the beneficiaries with certainty, it is rather private than public. As Mr. Perry remarks, charity begins where uncertainty of the beneficiaries begins: Perry on Trusts, sec. 687. 'It is the number and indefiniteness

of the objects, and not the mode of relieving them, which is the essential element of a charity. . . . A good charitable use is public, not in the sense that it must be executed openly and in public; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit": *Dodge v. Williams*, 46 Wis. 97, 98. "The rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities." "It is almost sufficient to say, for the purposes of this case, that the statutes of uses and trusts and against perpetuities are expressly limited to realty": *Dodge v. Williams*, 46 Wis. 95.

In view of the foregoing, that *Dodge v. Williams*, 46 Wis. 95, was ruled by an entirely different doctrine than *Ruth v. Oberbrunner*, 40 Wis. 238, as to personal property at least, without determining whether the doctrine of the former should be extended to realty, hardly admits of reasonable controversy. The theory of the former case is that trusts for charitable uses must have all the essentials of certainty, of private trusts; that of the latter case is that trusts for charitable uses, good by the rules of the common law, except as added to by the *cy pres* doctrine of the statute of Elizabeth, are good here, at least as to personal property. The case was distinguished from *Ruth v. Oberbrunner*, 40 Wis. 238, in that in the latter the subject of the trust was real estate and the trust was private. It was distinguished from *Heiss v. Murphey*, 40 Wis. 276, in that in the latter case the donees were uncertain and unascertainable. The reasoning of the early cases, inconsistent with that of the later case, was treated as obiter, and in that way the reasoning and decision in the latter easily harmonized ⁵⁰⁶ with the decisions in the former. Nothing actually previously decided was necessarily or in fact overruled.

From the foregoing it would seem that when we have determined whether the reasoning which led to the decision in *Dodge v. Williams*, 46 Wis. 95, and such decision, or the reasoning which led to the decision in *Ruth v. Oberbrunner*, 40 Wis. 238, is to prevail as the law of this state, we shall have pretty nearly decided the vital question before us.

Gould v. Taylor Orphan Asylum, 46 Wis. 106, decided with *Dodge v. Williams*, 46 Wis. 95, need not be commented upon to any great extent. The justice who delivered the opinion delivered those in the two earlier cases, and followed the lines of the opinion of the chief justice in the accompanying case. The bequest was to trustees for the care of orphan children

of Racine county, and such other poor, neglected, and necessitous children as the managers might decide to receive. The formation of a corporation to receive the fund and administer it was contemplated, but not made imperative. It was decided that the fund, without a corporate organization, could be permanently retained and administered by trustees for the charitable work contemplated by the donor. That, it will be observed, is the common-law doctrine of charitable trusts. The court said, in effect, if any or all of the trustees should refuse to act, or fail from any cause, the court of equity would have undoubted equitable jurisdiction to supply trustees, indefinitely, and support the trust and give effect to the charitable use declared by the donor. The idea, it will be observed, was that certain beneficiaries vested with an equitable title corresponding to the legal title held by the trustees, who could come into court and enforce the trust after the manner of private trusts, were not deemed necessary.

A review of cases touching the subject under discussion would not be complete if an idea thrown out in *De Wolf v. Lawson*, 61 Wis. 469, 50 Am. Rep. 148, were passed without notice.

507 In *Dodge v. Williams*, 46 Wis. 70, on the subject of whether the law against perpetuities was important on the facts of that case, after suggesting that it was probably sufficient to support the negative, that both the statute of perpetuities and of uses and trusts are expressly limited to real estate, and referring, in effect, to the statutes as but re-enactments of common-law principles, Chief Justice Ryan said: "But were this otherwise, the statute limiting the rule against perpetuities to realty manifestly abrogates the English doctrine as applicable to personalty. *Expressio unius exclusio alterius*." Regarding that, in the *De Wolf* case, Justice Cole said: "There can be no question but the statute refers to real estate alone. It may, however, admit of doubt whether the remark of the chief justice is strictly accurate in saying that it abolishes the common rule of perpetuities as to personalty when applied to private trusts." "This common rule of perpetuity as to personalty may be unaffected by our statute." The quoted language of Justice Cole was referred to in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, where the subject under discussion was a charitable trust. It will be noted that Justice Cole's criticism was not intended to cast discredit on the decision in *Dodge v. Williams*, 46 Wis. 70, or the reasoning of the opinion

therein as to public trusts, and it is not supposed that the court in the Webster case intended to do so or to give weight to the criticism. The trust in the Webster case was sustained and the decision was grounded on the principles laid down in *Dodge v. Williams*, 46 Wis. 70.

The next case in order of time is *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, above mentioned. The opinion therein was written by the present chief justice. The general lines of *Dodge v. Williams*, 46 Wis. 70, were followed, except the test of certainty to be applied was rather indicated, but not decided, to be section 2081 of the statute of uses and trusts. There were two trusts called in question. One was to the First Presbyterian Church of the village of Omro, Winnebago county, Wisconsin, to use one-half of the ⁵⁰⁸ interest of the fund in defraying the annual expenses of the church, and the other half for the relief of the "resident poor," no particular class of poor being mentioned or particular method or kind of relief suggested. The other bequest was of a sum of money in trust to charity generally, no trustee being named, coupled with a recommendation, which the court held equivalent to a command, that the executors, in the event of their deeming the sum sufficient therefor, establish a school at some place in Winnebago county, to educate young men in the useful arts. It was held that the general bequest for charitable work was invalid, but that the gift to establish a school was valid, on the principle that where a bequest is made to alternative purposes, one of which is invalid, it will go to the one which is valid. The mere recommendation to establish a school, as stated, was treated by the court, by judicial construction, as a command. In the same way it was held that the establishment of a school contemplated the organization of a corporation to take the fund as trustee and administer it to educate young men in the useful arts. In the same way it was held that in the event of the fund not being sufficient to establish the school, that being the contingency named by the donor, it might yet be used for that purpose if sufficiently supported by funds contributed from other sources. Generally, it was said, in effect, that while the *cy pres* feature of the statute of Elizabeth—the prerogative jurisdiction conferred by it—is not a part of the law of this state, in so far as judicial power to construe and enforce trusts was exercisable by the chancellors of England, independent of the statute of Elizabeth and only confirmed by it, it is the law here. It will be observed that

such doctrine is in strict harmony with *Dodge v. Williams*, 46 Wis. 70, as to the degree of certainty required within the rules declared. The court said: "The scheme must be sufficiently indicated, or a method provided whereby it may be ascertained and its object made sufficiently certain to enable the ⁵⁰⁹ court to enforce the execution of the trust according to such scheme and for such object. It must be of such tangible nature that the court can deal with it. The mere direction to expend money 'for charitable purposes' *at large* is too indefinite and uncertain." The quotation is literal, including the italics. It will be seen that a declared particular purpose, as distinguished from a mere donation of a fund to charity, was all that was deemed essential to a good trust for charitable uses, as regards the work to be performed; and a trust being created with a trustee to select the persons from such indefinite classes as the "resident poor" or "young men," the requisite of definiteness of beneficiaries was satisfied. The case is in strict harmony with *Dodge v. Williams*, 46 Wis. 70, except in that, as before indicated, in the opinion, as the supreme and essential test to be applied, it was said, referring to the language of one of the trust provisions: "By the language thus employed such trust was fully expressed and clearly defined upon the face of the instrument creating it, and hence satisfies the requirements of subdivision 5, section 2081, of the Revised Statutes." However, the court did not, as is manifested by the reasoning of the opinion and the decision as well, regard the statutory test essential. So recent as the *De Wolf* case it had been affirmed that the statute of uses and trusts is limited to real property.

The subject was again discussed in *Hoffen's Estate*, 70 Wis. 522, opinion by Mr. Justice Orton. The bequest was direct "to the poor of the city of Green Bay." There was no trust, nor any ascertainable devisee or devisees. The bequest was held void in strict harmony with *Dodge v. Williams*, 46 Wis. 70, and *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278. The remarks in the opinion as to the indefiniteness of the individual members of the class, "the poor of the city of Green Bay," referred to the absence of definiteness as to devisees, not as to beneficiaries. Much confusion has occurred in citing that case by failing to distinguish between certainty as to donee or ⁵¹⁰ devisee in whom the title may vest, and certainty as to individual beneficiaries of the trust, which, in the very nature of things, is impossible. The difficulty, primarily, springs from confusing private with public trusts, following the idea that

the two are identical in this state in all essential particulars, requiring certainty of beneficiaries holding the equitable title the same as of donees or devisees holding the legal title, to the end that the former may enforce the trust. It is plainly indicated in the *Hoffen* case that the bequest would have been supported as a trust for charitable uses if a trust had been created so the court could have filled the office of trustee to administer the trust.

The next case to be considered is *Fuller's Will*, 75 Wis. 431, where there was a trust, a trustee, and also a particular purpose and use declared, to wit, the support of a colporteur and missionary of the Baptist Church within the state of Wisconsin. It was conceded that the trust was for a charitable use. The bequest was held invalid because the testator failed "to fully define his charitable scheme in his will," going back, apparently, to *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276. *Dodge v. Williams*, 46 Wis. 70, is not cited in the opinion. The rule in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, to the effect that a charitable scheme, to be valid, "must be sufficiently indicated in the will or a method provided whereby it may be ascertained and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object," was referred to and affirmed; but, as it seems, effect was given to the rule after the manner of private instead of public trusts. We will not further consider the case. The task of harmonizing it with *Dodge v. Williams*, 46 Wis. 70, and the cases subsequently ruled by the principles there declared to be the law of this state is one, as it seems, too great for room to hope for its successful accomplishment. There seems to be but one theory upon which possible harmony can be ⁵¹¹ based, and that is that the court supposed that the duties of a colporteur and missionary which may well be considered exceedingly uncertain, are so indefinite and indefinable that the trustee, with the broad discretion vested in the office under rules governing charitable trusts, could not intelligently define and administer the trust or the court determine the limits of it. Reasoning along that line, however, it must be admitted, would be quite too infirm to be adopted as satisfying any reasonable test of judicial certainty. The will designated the purpose of the trust to be the support of a Baptist colporteur and missionary. The broad rules of construction that easily met all difficulties in the *Webster* case would probably have

rendered what was supposed to be fatally uncertain, free from difficulty. The reasonable expectation and purpose of the testator, it might well be said, was that the colporteur would be required to do such work as is ordinarily performed by a Baptist colporteur and missionary.

In *Sawtelle v. Witham*, 94 Wis. 412, the validity of a trust for charitable uses was again challenged for uncertainty on the reasoning in the opinion in *Heiss v. Murphey*, 40 Wis. 276, but was sustained as sufficiently certain to satisfy all the requirements of a charitable trust according to the doctrine of *Dodge v. Williams*, 46 Wis. 70, and *Gould v. Taylor Orphan Asylum*, 46 Wis. 106, they being cited as stating the law of this state. There was a trust, but no trustees, those named by the donor having refused to act. The purpose of the trust and use declared was to invest the fund and devote the income to the support, maintenance, education, or aid to that end, of such indigent orphan children under the age of fourteen years, in Rock county, Wisconsin, as in the judgment of the executors may be most needy and deserving. "Vagueness," said Mr. Justice Newman, who wrote the opinion, "in some respects, is essential to a good gift for a public charity"; and further, in effect, courts will not allow such a trust to ⁵¹² fail because the trustee cannot act, or refuses to act, or the objects of the charity are uncertain. Courts carry out, by liberal, judicial rules of construction applicable to such favored donations the intent of the donor, by supplying a trustee, rather than that the trust fail; and holding that the power of selection of immediate beneficiaries and of working out the details of the particular purpose, generally stated, was intended to be a matter of administration by such trustee; and that, according to the judicial policy, well established, charitable bequests are within the department of human affairs where the method adopted, indicated, should be applied rather than that the charitable design of the donor should fail. "Ut res magis valeat, quam pereat."

The most recent case where the question under consideration was referred to is *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106. The only bequest in that case material at this time was one to the Roman Catholic bishop of the diocese of Green Bay to be used for masses for the repose of the soul of the testator and the souls of various members of his family. It is sufficient to harmonize the decision condemning the bequest with *Dodge v. Williams*, 46 Wis. 70, to say that it was

considered that the intent was to create a private trust, pure and simple, hence that it was invalid for want of certain beneficiaries to hold the equitable interest, competent to enforce the trust. True, that does not appear very clearly from the opinion, but it was certainly the view of a majority of those who participated in the decision. It must be admitted that the opinion may reasonably be read, as by the supreme court of Illinois in *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241, as supporting the doctrine that trusts for charitable uses must be tested, as to definiteness, the same as private trusts, all distinctions between the two classes of trusts having been abolished in this state. It was said in the opinion, speaking of all the trusts considered, "they are void for uncertainty and wholly incapable of being executed by a ⁵¹³ court of equity by virtue of its jurisdiction over private trusts; since they cannot be so executed they must necessarily fail." It will be noted, however, that the precedent cited for condemning the trust for masses treats such a trust as private. Whether such a trust is private or charitable, and whether void if of the former class, there is a conflict of authorities; but they are in substantial harmony in support of such a trust if held public: *Schouler, Petitioner*, 134 Mass. 426; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48; *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Moran v. Moran*, 104 Iowa, 216, 65 Am. St. Rep. 443. In the *Hoeffer* case, Mr. Justice Cartwright, who delivered the opinion, said: 'The rules of law which would invalidate the trust as an express private trust do not affect its validity, because it is a charitable trust. The equitable jurisdiction over such trusts was not derived from the statute of Elizabeth, but prior to and independent of that statute charities were sustained irrespective of indefiniteness of beneficiaries or the lack of trustees, or the fact that the trustee was incompetent to take.' More need not be said in regard to *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106. The decision, as indicated, was placed on the ground that a trust for masses is private. So viewed, the decision is in harmony with *Dodge v. Williams*, 46 Wis. 70, and whatever was said inconsistent with such view must yield to the decision itself and to the established doctrine of this state distinguishing trusts for charitable uses from private trusts.

Thus we have seen that, with a single exception, the decisions of this court from *Dodge v. Williams*, 46 Wis. 70, to the

present time, are in harmony, and it must be held that such case states the law of this state as understood from the time it was decided. The single break in the line of decisions, in view of the quick return to such line, should not be taken as a considerate change of judgment as to the law at any time. *Dodge v. Williams*, 46 Wis. 70, and the cases expressly ruled by it, correctly state the law on the points essential to the conclusion ⁵¹⁴ here reached, and whatever there is in other cases, decisions, or reasons for decisions, inconsistent therewith, must yield to that view.

It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses. Given a trust, with or without a trustee, a particular purpose—as education, or relief of the poor, as distinguished from a bequest to charity generally—and a class great or small, and without regard to location, necessarily, as “worthy indigent females,” or “indigent young men studying for the ministry,” or “resident poor,” or “indigent children of Rock county,” or “the boys and girls of California” (*People ex rel. Ellert v. Cogswell*, 113 Cal. 129), and we have a good trust for charitable uses. The court, through its strictly judicial power, may fill the office of trustee if necessary, the trustee can select the immediate beneficiaries or objects within the designated class and scheme; he can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution. At no step is the court required to exercise *cy pres* power in the sense of prerogative authority, or at all, except as the term is found used in regard to those liberal rules of judicial construction applied by courts of equity to charitable trusts, well exemplified in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, for determining the intent of a donor in creating a trust for a designated proper charitable purpose. Such power, in the sense last indicated, was exercised in England both before and since the statute of Elizabeth, and has been ⁵¹⁵ exercised in this country since the Revolution, in states where the statute of Elizabeth is part of their system, and those where it is

not, except in a few instances, as hereafter indicated, where the rejection of such statute was supposed to carry with it the whole common-law system of trusts upon the erroneous theory that the one depended upon the other, and a few states that followed the New York theory that the statutes of uses and trusts and of perpetuities abolished common-law charitable trusts.

A short history of how it came about that the two conflicting theories, discussed in this opinion, came to have some place in our system, will add clearness to the rule adopted as correct. In the formative state of the law in this country after the Revolution, the common law of England, including the principles of equity as there recognized, so far as adapted to our customs, circumstances, and form of government, was accepted as the groundwork of an American system. In that we inherited, in the main, the common-law system of trusts for charitable uses. Two controversies early commenced: 1. As to whether the English system of charities originated with and was dependent upon the statute of 43 Elizabeth, chapter 4; 2. Whether such system was adapted to our system of civil government and adopted. The varying conclusions reached as to such controversies resulted in building up different systems in different states, according to their respective judicial determinations in regard to such controversies. In Massachusetts, and some other states, the first controversy named was decided in the negative, and the second in the affirmative as regards the principles of the statute; and the result was an adoption, in such jurisdictions, of the entire common-law system of charities, barring the *cy pres* feature of the statute of Elizabeth, not exercised by courts of equity before the statute—that is, the prerogative right of disposal outside of the declared intent of the testator, or where there is a gift to charity generally with no use specified and no ⁵¹⁶ trust interposed and no provision made for appointment, or the power of appointment was delegated to particular persons who died without exercising it: *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645; *Jackson v. Phillips*, 14 Allen, 539; *Heuser v. Harris*, 42 Ill. 425. In a few instances the statute was rejected in toto; notably in Maryland, the very opposite conclusion being reached from that in the Massachusetts court. That is, it was held that the entire common-law system of charities originated with and is dependent upon the statute of Elizabeth; that the statute is not adapted to this country, and that a court of equity cannot en-

force the execution of a devise or bequest to charitable uses unless it has all the elements of certainty requisite to a private trust, including certainty of beneficiaries to hold the equitable title corresponding to the legal title vested in the devisees or legatees: *Dashiell v. Attorney General*, 5 Har. & J. 392, 9 Am. Dec. 572; *Needles v. Martin*, 33 Md. 609. That was based on an early adjudication by the supreme court of the United States which was overruled after the Maryland system was too firmly established to be changed without unduly disturbing property rights. The beneficiaries, it was held, must be sufficiently definite to be recognized by the court as entitled to enforce the trust after the manner of private trusts, the following designations of beneficiaries being held fatally defective: "The education of free colored persons in the city of Baltimore"; "resident indigent and necessitous poor persons of the Twelfth ward of the city of Baltimore": *Barnum v. Baltimore*, 62 Md. 275, 50 Am. Rep. 219. In *Philadelphia Baptist Assn. v. Hart*, 4 Wheat. 1, opinion by Chief Justice Marshall, decided in 1819, the law was laid down on the lines followed by the Maryland court four years later, as above indicated, the ground of the decision being that the English system of charities originated with, and is wholly dependent upon, the statute of 43 Elizabeth, chapter 4. In the famous *Girard will case* (*Vidal v. Girard*, 2 How. 127), in which Mr. ⁵¹⁷Binney appeared on the one side and Mr. Webster on the other, and the opinion was delivered by Mr. Justice Story, in one of the most exhaustive treatments of the question ever given to a subject in that great court, *Philadelphia Baptist Assn. v. Hart*, 4 Wheat. 1, was overruled, and it was held that the common-law system of charities did not originate with, nor was it dependent upon, the statute of Elizabeth. Speaking of some forty English authorities examined, Mr. Justice Story said: "They show that trusts for charitable uses were known and enforced in courts of equity through their strictly judicial powers long before the statute of Elizabeth in cases where there was indefiniteness as to beneficiaries, where the charity itself was uncertain, where there was no trustee appointed, or the trustee was not competent to take." That view of the law was adopted and has since been adhered to by the federal court: *Perin v. Carey*, 24 How. 465; *Kain v. Gibboney*, 101 U. S. 362. It was adopted in many of the states before the law was settled as above, and by all, afterward, where the

question was open to discussion as to trusts specifying in general language the kind of charitable work to be done.

In New York the situation at the start was complicated by the fact that in 1788 a law was passed repealing the statute of Elizabeth: N. Y. Laws 1788, c. 46, sec. 37. It was claimed that when that circumstance occurred it was commonly understood that the English system of charities was dependent on the statute of Elizabeth, hence that its repeal should be held to show a legislative intent to abolish the whole common-law system of charities. The contrary, however, prevailed, the law being settled substantially as afterward laid down in the Girard will case: *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437, 18 Am. Dec. 516. Then came the statutes of 1829, of perpetuities and of uses and trusts. The controversy soon arose, thereafter, as to whether the legislative intent, by the general language of those statutes, was to ⁵¹⁸ abolish trusts for charitable uses. The situation at this point may be best illustrated by quoting from the opinion of Chancellor Sandford in *Shotwell v. Mott*, 2 Sand. Ch. 46 [50]: "We inherited from our mother country the law of charitable uses, with the blessed spirit that gave rise to it." "Did the Revised Statutes intend to cut off gifts and devises to charitable uses for all time to come? For if the article 'Of Uses and Trusts' applies to charitable uses, that must have been the intention in respect to all save devises to corporations directly for their own use. The proposition is startling and of vast importance, and I presume everyone, on first hearing it, will declare that it is impossible; that no legislature of the nineteenth century could have intended such a result." By analogy to the common-law policy regarding charitable uses, and authorities to the effect that statutes in general language in England had been uniformly construed there as not affecting public trusts, a conclusion was reached that the New York statutes were but re-enactments of the common law, and were not intended, said the chancellor, "to affect charitable uses or public trusts, which spring from benevolent instead of interested motives, and are for the benefit of classes of people not personally known to the benefactor, and not for the pecuniary advantage of a designated individual." Such was the situation when this state was admitted into the Union and the statutes of perpetuities and of uses and trusts were adopted substantially as they now exist, in all essential particulars copied from those of New York, except that personal property was omitted from the stat-

ute of perpetuities. In *Williams v. Williams*, 8 N. Y. 524, decided in 1853, the law as laid down by Chancellor Sandford, and in the *Girard will case*, was examined and adopted as the law of New York, in an opinion by Mr. Justice Denio, which for depth of research leaves little room, if any, for discussion. A few years later, in *Owens v. Missionary Soc.*, 14 N. Y. 380, 67 Am. Dec. 160, the soundness of *Williams v. Williams*, 8 N. Y. 524, was ⁵¹⁹ called in question. From that time on there was a "judicial struggle" over the subject for a period of some twenty years. It did not wholly end with *Levy v. Levy*, 33 N. Y. 97, decided in 1865, which placed public trusts on the same basis as private trusts, overruling *Williams v. Williams*, 8 N. Y. 524. The controversy thereafter definitely reached this court in *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276, where *Levy v. Levy*, 33 N. Y. 97, was followed. Thereafter a similar decision was made in *Michigan (Methodist Episcopal Church v. Clark)*, 41 Mich. 730) on the strength of *Ruth v. Oberbrunner*, 40 Wis. 238, and the New York authorities, rejected as not controlling in *Dodge v. Williams*, 46 Wis. 70, which had been decided but not published. The dispute in New York may be said to have ended in 1873, when in *Holmes v. Mead*, 52 N. Y. 332, the law was declared settled on the lines of *Levy v. Levy*, 33 N. Y. 97, and *Bascom v. Albertson*, 34 N. Y. 584, the court saying, substantially, that the statute must be held to have abolished all uses and trusts except those particularly named therein, leaving the court no discretion to support a charitable trust having no certain beneficiaries competent to hold the equitable title and to enforce the trust. The *Tilden will case* in 1891 (*Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487) developed so fully the mischiefs of the system that had been constructed on the ruins of *Williams v. Williams*, 8 N. Y. 524, that in 1893, by chapter 701 of the laws of that year, the former doctrine was in effect restored. So it will be seen that, so far as this court departed from the true line, there was a quick return, while the departure was so long continued in New York that it required a legislative enactment to remedy the difficulty.

Before applying to this case the principles above indicated to be the law, a suggestion should be considered as regards whether the promotion of temperance is a proper subject for a charitable trust, a question on that point having been raised by respondents' counsel. A general statement of the essentials of a charity, as regards the character ⁵²⁰ of the work to be

performed, will substantially solve the question. It includes everything that is within the letter and spirit of the statute of Elizabeth, considering such spirit to be broad enough to include whatever will promote, in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons. To that extent such statute is generally held to be a part of the common law of states even that reject all the other features of it. To mention the particular objects of charity named in the English statute would serve no practical purpose, so that is omitted. The general scope of the statute, considering its letter and spirit, as before indicated, has been judicially stated by judges of great learning, whose statements have come to be referred to generally in judicial opinions as the true test rather than the statute itself. The most familiar judicial statement of the law, as recognized by the courts, is known as Gray's rule, and is found in *Jackson v. Phillips*, 14 Allen, 539, where the bequest under consideration was for the benefit of fugitive slaves, an object quite remote from any specifically mentioned in the English statute. It was held, nevertheless, to be within the spirit of the statute. After discussing various views of the term "charity" as applied to charitable trusts, Justice Gray said: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Another definition often quoted was given by Mr. Binney in the *Girard will case*: *Vidal v. Girard*, 2 521 How. 127. It is as follows: "Whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." Perhaps a more concise, comprehensive, and practical definition is that found in *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, as follows: "Any gift, not inconsistent with existing laws, which is promotive of science or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the

diffusion of useful knowledge, or is for the public convenience, is a charity within the meaning of the authorities, whether so denominated in the instrument which evidences the gift or not." Another rule, capable of being understood and applied by any person of ordinary understanding, was given by Lord Camden in *Jones v. Williams*, Amb. 652, and approved by the supreme court of the United States in *Perin v. Carey*, 24 How. 465, as follows: "A gift to a general public use, which extends to the poor as well as the rich." The theory of that is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity.

The rules above given are sufficiently comprehensive to render search for precedents where the promotion of temperance has been considered charitable work unnecessary, though it may be noted that in *Saltonstall v. Sanders*, 11 Allen, 446, a gift to a trustee to promote, or in aid of, objects and purposes of temperance was held to be a good charitable trust.

Great and fatal indefiniteness is suggested in regard to the meaning of the term itself, "temperance work in the city of Milwaukee," as used by the donor. To refer to dictionaries for definitions, and display a number of meanings ⁵²² that might be read out of the term, would only tend to obscure that which is plain. In the light of the facts, the term means, obviously, work to prevent, so far as practicable, the use of intoxicating liquors. If there were any doubt about that, the character of the work pursued by the organizations selected to receive special aid from the trust fund would readily solve it.

Further uncertainty in the scheme is suggested in that the trustees are directed to expend the greater part of the fund for the benefit of the two corporations named, and upon the happening of a specified contingency, namely, the determination of either corporation to build a building, to use the funds then remaining to that end. No difficulty is discovered in any of these matters. They are uncertainties of a character commonly found in charitable trusts. They are easily within the discretionary power of the trustees to solve within such limits as the court may define, if necessary, by judicial construction. They are matters of detail much more easy of determination than how to preserve a trust fund left to establish a school "for the education of young men in the useful arts" on the contingency of its being sufficient for that purpose, in case the con-

tingency never happens; or what poor are to be benefited and the nature of it, in the bequest for the relief of the resident poor, found to be free from difficulty in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278.

There is little left that need be said in drawing a correct conclusion from the foregoing, as to whether the trust in question is valid. As before indicated, the vital question involved is whether charitable trusts, as distinguished from private trusts, have been abolished in this state, leaving only the latter as regards the essentials of certainty and rules of construction applicable; that is, whether the New York doctrine, adopted in the opinions in *Ruth v. Oberbrunner*, 40 Wis. 238, and *Heiss v. Murphey*, 40 Wis. 276, or the decision ⁵²³ and opinion in *Dodge v. Williams*, 46 Wis. 70, is to prevail. The conclusion reached is in favor of the latter. No other can be reached without overruling the entire judicial system based on the doctrine there adopted and here affirmed. The degree of certainty that such doctrine requires is correctly stated in *Webster v. Morris*, 66 Wis. 391, 57 Am. Rep. 278, and often since affirmed, as we have seen. That is: "The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money for charitable purposes at large is too indefinite to be carried into execution." In order not to depart from the correct line, however, the rule must be considered, not with reference to the statutory rule of certainty (Stats. 1898, sec. 2081), or that which is required in regard to private trusts, as indicated in *Ruth v. Oberbrunner*, 40 Wis. 238, and perhaps in *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106, but with reference to those liberal rules for judicial construction, applicable to charitable trusts.

It should be noted in passing that the rule above discussed, as indicated in the opinion where it was first pronounced, is based on the text in 2 *Redfield on Wills*, 409, subdivisions 2-4, and 505, subdivision 16, treating of the subject of certainty required in private trusts. The rule, however, is well adapted to charities, keeping in mind those judicial rules of construction mentioned, applicable to charitable trusts, and the essentials of a private trust, not material to a trust for charitable uses. That is, that certainty of beneficiaries holding the equi-

table title, who can enforce the trust, sometimes dwelt upon, is inconsistent with a public trust. The court, in pronouncing the rule, clearly indicated that it should be applied, having in view the considerations mentioned, by adding the explanatory sentence to the idea deduced from the text of ⁵²⁴ Redfield on Private Trusts, viz.: "The mere direction to expend money for charitable purposes at large is too indefinite and uncertain to be carried into execution under the rulings of this court in the cases cited," referring to *Dodge v. Williams*, 46 Wis. 70, as the last of such cases, limiting certainty in charitable trusts. If it were intended by the rule to mark the limitation of indefiniteness permitted in private trusts, the explanatory sentence would not have been used, which accurately marks the limitation applied generally to trusts for charitable uses—that corresponding to the division between judicial and prerogative power. So the rule in the Webster case merely excludes the exercise of cy pres power strictly so called, that is, as understood by the English court, the power (as said by Lord Alvanley, in *Attorney General v. Boulton*, 2 Ves. Jr. 380, and by Lord Eldon, in substance, in *Mills v. Farmer*, 19 Ves. 485, and approved by the master of the rolls in *Cherry v. Mott*, 1 Mylne & C. 123), where execution of the donor's purpose literally is impossible, to execute it otherwise, consistent with the general intention, so as to execute it in substance, though not in mode, considering charity as the legatee and mere mode of execution not of the substance of the donation.

It is not considered that anything new for this state has been decided in this case or that there has been any departure from the law as heretofore established and as the same has existed for a period so long as to become a rule of property that should not be disturbed. If there were any leaning toward a change in equity power as to charitable trusts, but there is none, it would naturally be toward enlarging rather than restricting it. As said by the learned chief justice in the case here so often referred to, "From time immemorial, the general inclination of courts of equity has been that way. 'Charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory'": *Dodge v. Williams*, ⁵²⁵ 46 Wis. 91. Donations in trust to that end, it is said, should not be declared void if they can by any possibility, consistent with law, be considered as good. So courts of equity go to the length of their judicial power rather than that such a trust

should fail, applying the maxim, *Ut res magis valeat, quam pereat*.

By the Court. That part of the judgment appealed from by George Henry Andrews and William Andrews is reversed. On the appeal of the executrix and trustees the judgment is reversed. Costs will be allowed in favor of the executrix and the trustees on their appeal against their codefendants, George Henry and William Andrews, and plaintiffs. Costs will be allowed to George Henry and William Andrews on their appeal against the plaintiffs. The cause is remanded for further proceedings in accordance with this opinion.

CASSODAY, C. J., DISSENTED. He conceded that the direction in the will to convert real estate into personalty was clearly mandatory, and that the real estate must be regarded as personal property; but, in his judgment, the mere direction to use and expend money in "temperance work," like a mere direction to expend money "for charitable purposes" at large, was too indefinite and uncertain to be carried into execution. He did not understand that the question of perpetuities was involved in the case. "The testatrix," he said, "in the clause of her will in question, directed the money to be expended in temperance work; but no reference is made as to how or in what manner it was to be so expended, or to whom paid, or who should be the beneficiaries. In other words, and with the construction placed upon it by my brethren, it authorizes the trustees to make a will for the deceased which she failed to make for herself. This, in my judgment, is a wide departure from the principles of law which have long been established in this and other courts where the *cy pres* doctrine under the English statute mentioned [43 Elizabeth, chapter 4] is not in force. That doctrine, as I understand it, allowed the representatives of the crown, under the act of parliament mentioned, to substitute what, in their judgment, was practically the nearest to what was supposed to be intended by the testator, but what he in fact had failed to express." He then cited *Morice v. Bishop of Durham*, 9 Ves. 399, 405, 406, to show that even in England, where that doctrine and that statute have been in force for three hundred years, a trust for "benevolence and liberality" is void for uncertainty under such statute, because "benevolence and liberality" are not mentioned in it, and hence such a trust is not supported by it. "Neither," said he, "is temperance or temperance work mentioned in that statute, and yet it is as general and indefinite as 'benevolence and liberality.' Besides, it opens the door for the dissipation of the estates of persons who have no definite conception of what

disposition they would make of their property, and so leave their property to be disposed of by their trustees after having expressed a general purpose or object of the bequest."

CHARITIES—FAVOR OF.—Gifts to charitable uses are highly favored and liberally construed to accomplish the intent of the donor: *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346. It is not material whether the benefits of the gift are confined to a particular locality or not, and the gift will not be allowed to fail for want of a trustee: *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502.

WILLS.—EQUITABLE CONVERSION does not occur unless there is an imperative direction in the will that land shall be converted into money or money into land: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135. A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but when it plainly appears from the will that it was the testator's intention that this power should be exercised, and that effect cannot be given to material provisions without its exercise, an equitable conversion of the property is as effectually accomplished by the will as if it contained a positive direction to sell: *Fahnestock v. Fahnestock*, 152 Pa. St. 56, 34 Am. St. Rep. 623. Compare *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. Rep. 675; and see the monographic note to *Ford v. Ford*, 5 Am. St. Rep. 141-148, in which the subject of equitable conversion is discussed at length.

CHARITABLE USES AND TRUSTS.—A charity is a gift for a public use: See monographic note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 249, showing what are charitable uses and trusts. The rule against perpetuities does not apply to gifts for charitable uses: *Mills v. Davison*, 54 N. J. Eq. 659, 55 Am. St. Rep. 594; monographic note to *In re Walkerly*, 49 Am. St. Rep. 127, 128, on the rule against perpetuities. Charities were known and recognized by the common law, independently of the statute 43 Elizabeth, chapter 4: See note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 252, 254, where the charities named in that statute are given. Compare the monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756-772, discussing the certainty and unity required in charitable trusts.

INDEX TO THE NOTES.

ADVERSE POSSESSION of lands of the United States, 479-486.

AMBASSADORS, jurisdiction of the courts over, 534.

ANIMALS, domestic, liability of owners for injuries inflicted by, 760.

ASSESSMENTS for street improvement, whether may exceed the amount of the benefit conferred, 357.

on stock of corporations, when and for what causes may be imposed, 126-132.

ATTACHMENT. See Jurisdiction by Attachment.

ATTORNEYS AT LAW, exemption of, from the service of civil process while attending court, 535.

BLASTING, liability of employer for, when done by an independent contractor, 421.

BOYCOTT, defined, 753.

CHARITABLE USES, temperance work, direction to expend money in, whether sufficiently definite, 955.

CONFLICT OF LAWS, statutes, liabilities created by, when may be enforced in another state, 203.

CONVERSION, equitable, when occurs, 956.*

CORPORATIONS, assessment of stock of, definition of, 126.

assessment of stock of, difference between and calls upon, 127.

assessment of stock of, directors alone can make, 127, 128.

assessment of stock of, stockholders, when and whether may make, 127.

assessment of stock of, who may make, 127.

assessments on paid-up stock before all the shares are taken, 132.

assessments on paid-up stock, by-laws cannot authorize, 131.

assessments on paid-up stock, by-laws restricting the amount of, 133.

assessments on paid-up stock, common law did not authorize, 128-130.

assessments on paid-up stock, consent of the stockholders may authorize, 130.

assessments on paid-up stock, constitutionality of statutes imposing on stock already issued, 132.

assessments on paid-up stock, freedom from is not a vested right, 132.

CORPORATIONS, assessments on paid-up stock, in excess of the amount authorized by statute, 133.

assessments on paid-up stock, must be authorized by statute or the articles of incorporation, 128.

assessments on paid-up stock, statutes authorizing, 132.

assessments on paid-up stock, stockholders may be authorized to make, 128.

assessments on paid-up stock, stockholders may make on themselves, 130, 131.

assessments on paid-up stock, whether authorized by statutes creating personal liability of stockholders for the corporate debts, 133.

assessments on stock issued as paid up when full payment has not been made, 134, 135.

by-laws undertaking to impose assessments on fully paid-up stock, 131.

lien of on their stock, when exists, 374.

personal liability of stockholders did not exist at the common law, 128, 129.

personal liability of stockholders, whether authorizes the assessment of fully paid-up stock, 133.

presidents of, have no implied authority to act as their agents, 634.

stock certificates, conditions in, a holder is deemed to assent to, 374.

stock in, issued as fully paid up to a bona fide purchaser, 195, 136.

stock in, issuing as fully paid up, when binding, 134.

stock in, issuing as fully paid up, when fraudulent, 135.

surety, power of, to become, 30.

DEFINITION of a corporation de facto, 122.

of assessment of stock in a corporation, 126.

of boycott, 753.

of calls on the stock of a corporation, 127.

of conspiracy, 753.

of eligibility to office, 588.

of high-water mark, 169.

of independent contractor, 382, 383, 394.

of seduction, 659, 665, 668-670.

DURESS, doctrine of, 851.

negotiable instruments, bona fide holders are not subject to the defense of, 850.

settlements induced by, 851.

EMINENT DOMAIN, measure of damages for property taken in, 811.

EXEMPTION FROM SERVICE OF CIVIL PROCESS, attorneys at law, while attending court, 535.

Congress, members of when attending, going to, or returning from, 534.

decoying persons into the state for the purpose of serving civil process on, 540.

criminal charge, arrest under does not prevent the service of civil process, 540.

criminal charge, persons brought within the state on, whether exempt from, 541.

exemption from arrest, whether includes exemption from service of civil process, 534.

military service, persons engaged in, 535.

nonresident suitors coming into the state, 538.

nonresident suitors coming within the state solely to attend to the trial of their cause, 536.

nonresident witnesses coming into the state, 538, 539.

of justices of the peace while holding court, 535.

of justices of the supreme court, 535.

of suitors in the national courts, 536, 537.

parties while attending court, 535.

privilege of, must be claimed, 542.

process, service of, on exempt person is not void, 535.

remedy for enforcement of, 542.

state legislatures, members of, whether exempt from, 534.

waiver of, 542.

witness attending court, proceedings to which applies, 537.

witness while attending court, 453.

INDEPENDENT CONTRACTOR, acceptance of work of, when renders the employer liable, 400.

blasting by, employer, when answerable for injuries caused by, 399, 421.

bridge, liability of employer for negligence of, in erecting, 422.

buildings, liability of employer for negligence in erecting, 421, 426.

corporations when liable for acts of, 410, 411.

dangerous work done by, liability of employer for, 396, 401, 407.

dangerous work, when not answerable for, 402.

definition of, 382.

duty of public, relief from cannot be had by employing, 400, 405, 408.

employer violating a duty imposed by contract or statute is not exonerated by the employment of, 408, 409.

fire, liability of employer for negligent starting of, 420.

highways, liability of employer of, for negligence in constructing, 423.

- INDEPENDENT CONTRACTOR**, illustration of acts and neglects of for which his employer is not answerable, 389, 390.
- incompetent, liability of employer for negligence of, 387, 388.
- injuries which might have been anticipated, liability of employer for, 402, 403.
- inspection of work of by the employer does not change the character of, 383.
- instrumentalities furnished by the employer, liability resulting from, 406.
- interference by employer which renders him liable to persons injured, 397.
- intrinsically dangerous work done by, liability of employer for, 396, 401.
- is liable for his own neglects or other torts, 427.
- is not a servant of his employer, 393.
- landlord, when liable to tenant for negligence of, 423.
- lateral support, liability of employer for acts of in withdrawing, 424.
- liability of employer for acts of, 384.
- liability of employer for injuries resulting from carrying out his own plans, 404.
- liability of employer for negligence of incompetent, 387.
- liability of employer where the thing done necessarily results in the injury of another, 403.
- liability of, for his negligent acts, 386.
- may be employed and paid by the day, 389-391.
- municipal corporations, when answerable for acts of, 399.
- municipal corporations, when answerable for negligence of, 417.
- mines, liability of employer for negligence of in doing work in, 425.
- negligence of, is not imputable to his employer, 384, 385.
- nuisance created by, employer, when answerable for, 391.
- nuisance created by for which the employer is not answerable, 401.
- owners of property in the hands of, are not answerable for his negligence, 389.
- payment, mode of, may tend to show whether one is, 394.
- public nuisance created by, liability of employer for, 400.
- railway corporations, liability of, for negligence of, in the management of its trains, 413.
- railway corporations, when answerable for acts of, 414.
- railway corporations, when not answerable for negligence of, 411-413.
- ratification by employer of negligent acts of, 409, 410.
- reservation by employer of right to control work of, 396.
- reservation of control of as to particular acts does not make the employer answerable as to others, 416.
- respondeat superior, doctrine of, does not apply to, 395.

INDEPENDENT CONTRACTOR, scaffolding, liability of employer for neglects of in erecting and maintaining, 425.

stevedores, when act as, 426.

streets, liability of employer for obstructions placed in by, 392.

supervision over by the employer which will not render him liable to third persons, 397, 398.

tests to determine who is, 383.

trespass of, employer is answerable for, 392.

trespass of, his employer not answerable for, 388.

walls, liability of employer of, for negligence of respecting, 426.

whether one is, is a question for the jury, 384.

who is a fit, proper, skillful, or competent, 387.

who is not a, 384.

work lawful in its nature, employer is not answerable for negligence of in doing, 393.

work, reservation of control over by employer, 393, 396.

INSANITY AS A DEFENSE TO A CRIMINAL CHARGE, burden of proof respecting, 92, 93, 95, 96.

burden of proof respecting, whether ever shifts, 95.

continuance of, when presumed, 86.

delirium tremens, 92.

delusions, 89, 90.

drunkenness is not, 91, 92.

drunkenness may be the cause of, 91.

drunkenness, temporary insanity produced by, 91.

existing before or after the commission of a crime, 85.

irresistible impulses, 90.

irresistible impulses, difference between and moral insanity, 90.

moral, 90.

partial, 84, 85, 88.

presumption against, burden of overcoming, 95, 96.

presumption against, evidence sufficient to overcome, 97.

presumption of sanity must be rebutted, 95.

presumption where it is shown to exist before or after the crime, 85, 86.

reasonable doubt respecting, 92-95.

test of ability to distinguish between right and wrong, 88, 89.

test of, 87, 88.

time, when must exist, 85.

whether may lessen the degree of the crime where it is not a complete defense, 83, 84.

INSURANCE, encumbrances, failure to disclose, when does not avoid the policy, 454.

JUDGMENT, foreign, jurisdiction is presumed, but may be disproved, 790.

JURISDICTION, ambassadors and public ministers are exempt from that of the courts of the country, 534.

JURISDICTION BY ATTACHMENT, affidavit for, cannot be aided or attacked by parol, 801.

affidavit for, defects in which render the judgment voidable only, 802.

affidavit for, founded on information and belief only, 802.

affidavit for, in the disjunctive, 802.

affidavit for, omissions of, or defects in, 801, 802.

affidavit for, sworn to before an officer not authorized to administer oaths, 801.

affidavit for the attachment is the foundation of, 801.

collateral attack on the affidavit cannot be made, 802.

facts sustaining must appear by the record, 800.

nonresidence of the defendant, failure of the affidavit to state, 801, 802.

strict pursuit of statutory directions is essential, 800.

summons, publication of, cases holding it not essential, 805.

summons, publication of, defects in which render the judgment void, notwithstanding the levy, 803, 804.

summons, publication of is essential, 803, 804.

summons, publication of, must appear by the record, 804.

summons, publication must not precede the attachment, 803.

LANDOWNER, trespassers on dangerous premises, liability to, 169.

MUNICIPAL CORPORATIONS, independent contractors, delegation of duty to does not relieve municipality from liability, 418, 419.

independent contractors, negligence of in matters collateral to the execution of the work, 420.

independent contractors, when answerable for negligence of, 417.

laws general in form but in fact relating to one only, 25.

NEGOTIABLE INSTRUMENTS, uncertainty in which renders instrument non-negotiable, 598.

PRESUMPTION of sanity, burden of overcoming, 95, 96.

of sanity, evidence sufficient to overcome, 97.

of sanity must be rebutted by a person charged with crime, 95.

of the continuance of insanity, 85, 86.

PRIVILEGE of suitors and witnesses to be exempt from the service of civil process, 534-542.

PUBLIC LANDS OF THE UNITED STATES, adverse possession of, may exist as against a private citizen, 481.

adverse possession of mineral lands of, 485.

PUBLIC LANDS OF THE UNITED STATES, adverse possession
of, prior to the issuing of a patent, 480.
adverse possession of, under a tax deed, 482.
adverse possession, title thereto cannot be acquired by, 479.
color of title, what constitutes so as to support prescriptive
title, 483, 484.
concurrent possession under adjoining surveys, 482.
land office, certificate of, constitutes color of title, 483, 484.
Mexican grants, adverse possession of prior to the issuing of
a patent, 482, 483.
mineral lands of, adverse possession of, 485.
pre-emption claim does not constitute color of title, 484.
prescriptive right to cannot be created, 479.
prescriptive title to waters on, 484.
public highways over, prescriptive title cannot exist, 479.
public highways over, grant of right to contained in the Re-
vised Statutes, 479.
public highways over, prescriptive title cannot exist, 479.
school lands, adverse possession of, 486.
waters upon, prescriptive title to, 484.

RAILWAY CORPORATIONS, baggage, liability for, when com-
mences, 92.
independent contractor, duty cannot be delegated to so as to
avoid liability for its nonperformance, 415.
independent contractor, trespass of, when liable for, 416.
independent contractor, when answerable for negligence of, 414.
independent contractor, when not answerable for negligence of,
411-413.

RAPE, civil action by father for, 664, 668.
sleeping woman, intercourse with, 717.

SEDUCTION, art, promises, or deception sufficient to sustain
woman's action for, 666, 667.
artifice to accomplish must be such as is calculated to mislead
a virtuous woman, 667.
by a married man, 668.
chastity, want of, on the part of a woman suing for, 669.
civil action for, by a woman, previous unchaste character is not
essential to, 668.
civil action for, by a woman, promise of marriage is not nec-
essary to support, 668.
civil action for, by the woman seduced, 666.
civil action by parent for, consent on the part of the woman
is no defense to, 661.
civil action by parent for may be sustained by facts which
would not support a criminal prosecution, 661.

SEDUCTION, civil action by parent for, mere proof of sexual intercourse and subsequent sickness sustains, 662.

civil action by parent for, previous want of chastity of the daughter as mitigating damages, 664, 665.

civil action by parent for, unchaste character of daughter no defense to, 664.

civil action by parent for, was founded on the loss of services, 659.

civil action by parent for, willingness or consent by daughter may be proved in mitigation of damages, 662, 663.

crime of, consent of the woman is essential to, 672.

crime of, deception essential to support prosecution for, 671.

crime of, definition of, 670.

crime of, definition of deception sufficient to support prosecution for, 671.

crime of, force, intercourse accomplished by, does not amount to, 672.

crime of, good repute of woman, presumption respecting, 681.

crime of, infant may commit under promise of marriage, 675.

crime of, intercourse by force does not constitute, 672.

crime of, intercourse for a consideration does not constitute, 672.

crime of, intercourse resulting from mutual desire cannot constitute, 672.

crime of, marriage, promise of, if the woman becomes pregnant, 675, 676.

crime of, marriage, promise of, if the woman will submit, 673.

crime of, marriage, promise of, is not an essential element of, 670.

crime of, marriage, promise of, may relate to a future time, 675.

crime of, marriage, promise of, need not be expressed in words, 675.

crime of, marriage, promise of, need not be repeated when the intercourse takes place, 674, 675.

crime of, marriage, promise of, need not be valid, 675.

crime of, marriage, promise of, offer to perform, whether a defense, 677.

crime of, marriage, promise of, statutes requiring some persuasion in addition thereto, 674.

crime of, marriage, promise of, what sufficient to support prosecution for, 672, 673.

crime of, marriage, promise of, married man, whether and when may commit, 676, 677.

crime of, mere sexual intercourse does not amount to, 670.

crime of, previous chaste character, burden of proof respecting, 681.

crime of, previous chaste character, conduct of the woman after her seduction is not admissible to show want of, 681.

SEDUCTION, crime of, previous chaste character may exist with great freedom of manners and even with permitting undue familiarities, 679.

crime of, previous chaste character of the woman is an essential element of, 678.

crime of, previous chaste character, presumption of, sufficient to overcome, 681.

crime of, previous chaste character, reasonable doubt of, 681.

crime of, previous chaste character, repute of as evidence, 681.

crime of, previous chaste character, virginity is not essential to, though the woman has never been married, 682.

crime of, previous chaste character, want of long before the seduction does not disprove, 682.

crime of, previous chaste character, what is, 678, 679.

crime of, previous chaste character, whether presumed, 680, 681.

crime of, proofs and promises essential to, 670, 671.

crime of, subsequent marriage of the parties as a defense to prosecution for, 677, 678.

crime of, subsequent marriage with an intention on the part of the husband to desert, 677, 678.

definitions of, 659, 665, 668, 670.

damages, loss of services is a minor element in estimating, 660.

force, may be accomplished by, 664, 668.

father's right of action for, 659, 660.

loss of services, states in which it is necessary to maintain an action for, 661.

marriage, promise of is not essential element of, 668.

may be both a crime and a civil injury, 659.

mitigation of damages, evidence of prior improper conduct, 669.

services, constructive, will sustain father's right of action for, 660.

services, legal right to demand is sufficient, 660.

services, right to which will sustain father's action for, 660.

statutes making the gist of the act the seduction instead of the loss of services, 661, 663.

SPECIFIC PERFORMANCE based on contract for personal services, 629.

STEVEDORES, whether act as independent contractors, 426.

STOPPAGE IN TRANSITU, right of, when terminates, 436, 437.

SURETY, corporation, power of to become, 30.

TRESPASSERS, infant, liability of owner of premises for injuries received by, 169.

on the premises of a railway corporation, recovery by for injuries received, 169.

WILLS, destruction of one will not revive another, 251, 252.

olographic, republication of revoked, 261.

parol republication of a revoked will, 253.

republication, by a codicil, 260, 261.

republication is unnecessary where the revoked will is itself revoked, 251.

republication of a revoked will by acknowledging before persons who were not subscribing witnesses to the original, 259, 260.

republication of a revoked will by reacknowledgment before the original subscribing witnesses, 259.

republication of a revoked will from which the signatures have been torn, 259.

republication of a revoked will which has remained intact, 258, 259.

republication of, definition of and necessity for, 249.

republication of may be express or implied, 250.

republication of may depend on a second will becoming inoperative, 250.

republication of revoked, must be by the same formalities required for the original will, 253, 254.

republication of revoked olographic wills, 261.

republication of revoked, whether may be by parol, 253.

republication of wills affecting real property, 255.

republication of wills where the mode is not expressly provided by statute, 257, 258.

revivor of one by the destruction of another, 250.

revivor of revoked will does not arise from destroying the revoking will, 251.

revocation of, may be by a separate writing, 252.

revocation of, may depend on a second will becoming operative, 250.

revocation of may be express or implied, 250.

WITNESSES, privilege of, of exemption from service of civil process, 535, 538, 539.

INDEX.

ABUTTING OWNERS.

See Railroads, 12-14.

ACCIDENT INSURANCE.

See Insurance, 1-3.

ACCOMMODATION PAPER.

See Negotiable Instruments, 3, 4; Partnership, 1; Trusts, 3.

ACTIONS.

ELECTION—CHOICE OF REMEDIES.—If a plaintiff has a choice of remedies, he may elect. (*Finch v. Park*, 588.)

See Assumpsit; Bonds, 3; Boycott, 2, 3; Conflict of Laws, 1, 3; Corporations, 11; Fraudulent Conveyances, 6; Judgments, 9; Malicious Prosecution, 2; Negligence, 1; Taxes, 1.

ADMISSIONS.

See Evidence, 9.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION AGAINST THE STATE.—Under a statute which makes applicable to the state a provision that no action shall be maintained for the recovery of real property unless the plaintiff or his grantor was seised or possessed thereof within ten years before the commencement of the action, the state may be disseised of lands by adverse possession the same as an individual. Hence the holding of state lands for the statutory period will bar an action by the state and confer good title upon the holder. (*Schneider v. Hutchinson*, 474.)

2. ADVERSE POSSESSION OF STATE LANDS—ACTION—SCHOOL LAND COMMISSIONERS.—One who has acquired title to state lands by adverse possession cannot be deprived of his rights, without notice and without an opportunity to be heard, by the action of a board of school land commissioners in issuing and delivering to a purchaser a deed to such lands. (*Schneider v. Hutchinson*, 474.)

3. LIMITATIONS OF ACTIONS—HIGHWAYS—EASEMENTS. The public easement in highways, streets, and alleys dedicated to the use of the public by individuals, or under the exercise of the right of eminent domain, cannot be lost to the people through the statute of limitations by the negligence of the public authorities or the unlawful acts of individuals. (*Ralston v. Weston*, 834.)

4. EASEMENT—HIGHWAYS—PRESCRIPTION—ADVERSE POSSESSION.—An individual cannot destroy the public easement in highways, streets, and alleys by a claim of prescription, adverse possession under the statute of limitations, or equitable estoppel. (*Ralston v. Weston*, 834.)

See Limitation of Actions.

AFFIDAVIT.

See Attachment, 1-3.

AGENCY.

See Insurance, 8; Vendor and Purchaser, 4.

ALIENATION OF AFFECTIONS.

See Injunctions, 4, 5.

ALIMONY.

See Marriage and Divorce, 1-5.

ANIMALS.

1. ANIMALS—KEEPER OF VICIOUS DOG—DUTY OF.—The keeper of a dog is charged with the same duty to restrain it, if he is aware of its propensity to bite persons, that is imposed upon an actual owner of the animal. (*Plummer v. Ricker*, 757.)

2. ANIMALS—KEEPER OF DOG—WHO IS.—A person who houses, harbors, and feeds a dog in the way that such animals are usually kept by owners, and permits it to be a member of his family, in so far as such domestic animals can be members of families, may well be regarded as its keeper. (*Plummer v. Ricker*, 757.)

3. ANIMALS—DOGS—VICIOUSNESS—EVIDENCE.—The viciousness of a dog may be shown by evidence of vicious acts not within the knowledge of its keeper. (*Plummer v. Ricker*, 757.)

APPEAL.

1. APPEALS—HARMLESS ERROR.—If the court, and not the jury, should pass on a matter and find thereon, but the jury finds upon it, and such finding is not prejudicial error, and the court renders the same judgment upon such finding that it should have rendered if the finding had been left to it alone, the error is harmless, and not ground for reversal. (*Miller v. White*, 791.)

2. APPEAL.—FINDINGS OF FACT made by a trial court cannot be disturbed on appeal unless they are contrary to the clear preponderance of the evidence. (*Dillman v. Carlin*, 902.)

3. APPEAL—MASTER'S FINDING—CONCLUSIVENESS OF.—A master's finding that the description of land in a mortgage includes land already mortgaged to another is conclusive. (*Howard v. Clark*, 782.)

4. APPEAL—PRESUMPTION TO SUPPORT FINDINGS.—The rule that it is presumed on appeal that a referee found every fact necessary to support the judgment prevails only when the finding was within the scope of the pleadings and the evidence; hence a finding that a claim made by a partner for interest on advances of money to and for the use of a firm is disallowed because there

was no agreement that such interest should be paid, and that the right to interest does not exist in the absence of an agreement, is not a finding that the money advanced was capital, but is rather a finding that it was a loan, where the complaint alleges that the plaintiff made loans to the firm, and the defendant denies the allegations and then admits them and alleges that the loans were paid. (*Rodgers v. Clement*, 342.)

5. APPEAL—EXCEPTIONS—"FACTS APPEARED"—MEANING OF.—When exceptions state that certain "facts appeared," they mean that there was no controversy over the existence of such facts. (*Ranchau v. Rutland R. R. Co.*, 761.)

6. APPEAL—MISSTATEMENT OF FACTS, BY COUNSEL.—IT IS REVERSIBLE ERROR for a court to permit counsel, in argument before the jury, to state facts not authorized by the evidence. (*Ranchau v. Rutland R. R. Co.*, 761.)

7. APPEAL—REVERSIBLE ERROR—INSTRUCTION.—The giving of legal abstractions in a charge to a jury is not reversible error, unless it appears that they may have been harmful. (*O'Rourke v. Citizens' St. Ry. Co.*, 639.)

8. APPEAL.—NO OBJECTION can be considered on appeal, unless it was taken upon the trial and saved by an exception. (*Sullivan v. Dunham*, 274.)

9. APPEAL.—THE PROVINCE OF THE APPELLATE COURT is to inquire only whether there is error in the judgment or decree appealed from, and not whether the reasons given for the conclusion reached are tenable. (*Robertson v. Blair*, 543.)

10. APPEAL—REVIEW OF EVIDENCE.—Errors must be specifically assigned in a petition in error or they will be disregarded. (*Churchill v. White*, 64.)

11. APPEAL—REVIEW OF FACTS.—QUESTIONS OF FACT material to a decision of the case are open to review in the appellate court, as a question of law under an assignment of error questioning the ruling of the trial court in refusing instructions. (*Best Brewing Co. v. Klassen*, 26.)

12. APPEAL.—AN ADMINISTRATOR WITH A WILL ANNEXED, who intervenes in a partition suit involving the construction of a will, and files a petition for the sale of the land to pay claims, cannot, after such petition is dismissed and an appeal taken, but not perfected, assign for error the dismissal of his petition upon an appeal by the defendant from the final decree in partition. (*Rose v. Hale*, 40.)

13. APPEAL—NOTICE OF.—A notice of appeal which fails to state the amount of the judgment, and misstates the date on which it was rendered, is insufficient. (*Beck v. Thompson*, 471.)

14. JUDGMENT-ROLL—WHAT PAPERS CONSTITUTE.—Under a statute making "all orders or papers in any way involving the merits and necessarily affecting the judgment" a part of the judgment-roll, a petition to have a cause set down for trial before some other judge, for the reason that the presiding judge is indirectly interested, and may be prejudiced or biased, the order denying the application, and the exception taken thereto, are parts of the judgment-roll. (*First Nat. Bank v. McGuire*, 598.)

15. APPEAL—REVERSAL FOR EXCESSIVE DAMAGES.—Although the damages awarded by a jury are large, yet if they are well within the estimates of competent witnesses, the judgment will not be reversed. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

16. **APPEAL—REQUEST TO GO TO JURY—WHEN SUFFICIENT.**—A general request to submit the entire case to the jury is sufficient to save a party's rights upon the direction of a verdict for the adverse party, where neither the court nor counsel for the adverse party raises any question as to what particular question of fact the party desired to have the jury pass upon. (*Second Nat. Bank v. Weston*, 283.)

17. **APPEAL—THEORY NOT ADVANCED BELOW.**—Cases will not be reversed on appeal upon a theory not advanced and relied upon in the lower court. (*Parrish v. Mahany*, 604.)

18. **APPEAL—WHAT CANNOT FIRST BE RAISED ON.**—A contention not made in the court below cannot be considered on appeal. (*Parrish v. Mahany*, 604.)

19. **APPEAL.—AN ORDER LIMITING COSTS** is not subject to exception. (*Friel v. Plumer*, 190.)

20. **APPELLATE PRACTICE—SETTING ASIDE JUDGMENT.** The judgment of the trial court must be affirmed on appeal, if there is direct conflict in the testimony, and there is sufficient testimony in the record to support the verdict. (*Payne v. State*, 712.)

21. **APPEAL.—ERROR CANNOT BE PREDICATED** upon an improper answer to a proper question. (*Plummer v. Ricker*, 757.)

22. **APPEAL—EXCEPTION TO DIRECTION OF VERDICT—SUFFICIENCY.**—A mere exception to the direction of a verdict is sufficient to present the question on appeal without requesting that any fact be submitted, in the absence of implied consent that the case be decided by the court. (*Second Nat. Bank v. Weston*, 283.)

23. **CRIMINAL LAW—IMPROPER QUESTIONS.**—Obviously improper questions calculated to elicit clearly inadmissible evidence, but which is not admitted, are not ground for the reversal of the judgment in a criminal case, unless it is clearly shown that the defendant was prejudiced thereby. (*Griffin v. State*, 718.)

24. **VERDICT SETTING ASIDE.**—A verdict palpably contrary to the great preponderance of the evidence and contrary to law on the established facts must be set aside. (*Miller v. White*, 791.)

25. **APPEAL—NEW TRIAL.**—If there is evidence tending to sustain the verdict, and the trial court refuses to grant a new trial, although differing from the jury on the facts, such refusal is not reviewable error. (*McGhee v. Wells*, 567.)

ARSON.

ARSON—EVIDENCE OF INSURANCE.—Upon the trial of an accused for burning property for the purpose of recovering the insurance, where the accused refuses to produce the insurance policies, secondary evidence is admissible to show the contents of the policies, that they were made out by authorized agents of the insurance companies, and that the accused was claiming indemnity under them. (*Knights v. State*, 78.)

ASSESSMENTS.

See *Corporations*, 9, 10; *Injunctions*, 6; *Municipal Corporations*, 3-5; *Statutes*, 21.

ASSIGNMENT.

See *Checks*, 1; *Mortgages*, 8, 9; *Witnesses*, 4.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—PRESUMPTION.**—The right to make a voluntary assignment for the benefit of creditors exists at common law, and is presumed to exist in each of the states of the American Union. (Thompson Co. v. Whitehed, 51.)

2. **ASSIGNMENT FOR CREDITORS—CONFLICT OF LAWS.** A voluntary common-law assignment for the benefit of creditors, if valid where made, is valid in another state as against a creditor nonresident of the latter state who has levied an attachment on property in the possession of the assignee under the authority of such assignment. (Thompson Co. v. Whitehed, 51.)

3. **ASSIGNMENT FOR CREDITORS—FOREIGN CORPORATION—DOMESTIC CREDITORS.**—A foreign corporation which has failed to obtain a certificate authorizing it to do business in the state as required by statute at the time of the levy of an attachment by it on property in that state, but then in the possession of a foreign assignee for the benefit of creditors, cannot be regarded as a domestic creditor, and does not acquire any rights by virtue of its levy. (Thompson Co. v. Whitehed, 51.)

ASSOCIATIONS.

See Mandamus, 4.

ASSUMPSIT.

1. **ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED** can be maintained whenever one man has received, or obtained possession of, the money of another, which he ought, in equity and good conscience, to pay over. (Finch v. Park, 588.)

2. **AN ACTION FOR MONEY HAD AND RECEIVED** can be maintained against persons who, with knowledge that property has been attached, cause the sheriff to sell it and pay the proceeds over to them, where they refuse to surrender such proceeds on demand, and where the attaching plaintiff has recovered judgment for his debt, and kept his attachment alive. (Finch v. Park, 588.)

ATTACHMENT.

1. **ATTACHMENT—AFFIDAVIT—LIEN.**—A second affidavit and attachment on a different ground may be had in the same suit; but the second attachment does not, as a lien, relate to the first, and is a lien only from its levy as to personalty, or its date as to land. (Miller v. White, 791.)

2. **ATTACHMENT—AFFIDAVIT—JURISDICTION.**—A total absence of any affidavit in attachment fails to confer jurisdiction, but a mere insufficient averment in such affidavit, rendering it defective and voidable, does not make the proceeding void or without jurisdiction. (Miller v. White, 791.)

3. **ATTACHMENT—AFFIDAVIT AS PART OF RECORD.**—Whenever the validity of an attachment is involved, or the jurisdiction questioned, the affidavit for, and the order of, attachment are parts of the record. (Miller v. White, 791.)

4. **ATTACHMENT—FRAUD AS GROUND FOR.**—If a person buys property with positive intention not to pay for it, this is a fraudulent purchase, whether he makes false representations or not, and gives the vendor ground for attachment. (Miller v. White, 791.)

5. ATTACHMENT—INSOLVENCY—FRAUD.—A purchaser's knowledge that he is involved, and that his ability to pay is doubtful, does not alone, without positive intent not to pay, make the purchase fraudulent; but if, knowing his insolvency, he makes a statement that he is solvent to obtain credit, the purchase is fraudulent, and constitutes a ground for an attachment by the vendor. (*Miller v. White*, 791.)

6. ATTACHMENT—TITLE.—The rights of parties in property attached must be determined by the state of the title at the time the attachment is made, and they are not affected by the fact that the defendant may have subsequently acquired title. (*Richardson v. Bailey*, 176.)

7. ATTACHMENT—RIGHTS OF OFFICER.—After all liability of an attaching officer to the parties has ended, he cannot maintain an action against the receptor upon a receipt for the property attached. (*Richardson v. Bailey*, 176.)

8. ATTACHMENT.—DAMAGES FOR MENTAL SUFFERING caused by a malicious attachment of exempt property may be recovered. (*Friel v. Plumer*, 190.)

9. ATTACHMENT—INTERVENOR—PLEADING.—Any person interested in the property may intervene and dispute the validity of an attachment, or state a claim to, or interest in, or lien on, the property under attachment. He may challenge the validity of the attachment by plea in abatement. (*Miller v. White*, 791.)

10. EXEMPTIONS—PARTNERSHIP PROPERTY.—A statute exempting the tools of a debtor's occupation from attachment and execution does not apply to partnership property. Partners are entitled to exemptions only as individuals, and out of property which they individually own. (*Bateman v. Edgerly*, 162.)

11. GARNISHMENT—DAMAGES FOR.—Although a principal defendant has been injured by having his funds tied up in a bank by garnishment proceedings, he is not, after the dismissal of the complaint and upon the trial of the garnishee action, entitled to a judgment for damages against the plaintiff, by reason of the garnishment, where the statute does not authorize such a judgment. (*Veitch v. Cebell*, 914.)

12. ATTACHMENT—TRUSTEE PROCESS—NOTICE—DUTY OF TRUSTEE.—The service of trustee process is sufficient notice to the trustee that the ownership of funds in his hands is in question, and he should, for his own protection, await the judgment of the court thereon before paying the funds to anyone. Not to do so is to act at his peril. (*Dow v. Taylor*, 775.)

13. ATTACHMENT—TRUSTEE PROCESS—LIENS.—Plaintiff in trustee process does not acquire a lien upon specific chattels in the hands of the trustee by service upon him, nor does such service enable him to avoid a conveyance of the property by the debtor on the ground that it is fraudulent in law because intended as security, though absolute in terms. (*Corning v. Records*, 178.)

See Checks, 2.

ATTORNEYS' FEES.

See Executors and Administrators, 6, 7; Mechanics' Liens, 2.

BAGGAGE.

See Railroads, 1-5.

BAILMENTS.

BAILMENTS.—A GRATUITOUS lender of chattels is not liable for injury to a servant of the borrower from defects therein unknown to him, whether he ought to have known of them or not. (*Gagnon v. Dana*, 170.)

BANKS AND BANKING.

1. BANKS AND BANKING — UNINCORPORATED BANK — DISPOSAL OF ASSETS.—An unincorporated bank is not a de facto corporation, and its president, who is its sole owner, may transfer any of its property to secure a bona fide creditor. (*Longfellow v. Barnard*, 117.)

2. BANKS AND BANKING—DUTY TO DEPOSITOR.—The relation between a bank and its depositor is that of debtor and creditor, and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order and in conformity with his directions. (*Harter v. Mechanics' Nat. Bank*, 224.)

3. BANKS AND BANKING—FORGED CHECKS.—If a bank makes payment upon a check to which its depositor's name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor unless it shows a right to do so on the doctrine of estoppel, or because of some negligence chargeable to the depositor. (*Harter v. Mechanics' Nat. Bank*, 224.)

4. BANKS AND BANKING—FORGED CHECKS.—The return to a depositor of his check with a forged indorsement, together with his balanced pass-book, casts on him only the duty of exercising reasonable care and diligence to examine the vouchers and the account as stated by the bank, and to inform it of any errors thus discoverable. (*Harter v. Mechanics' Nat. Bank*, 224.)

See Guaranty.

BLASTING.

See Real Property, 2, 3.

BONDS.

BONDS—ACTION ON—PLEADING.—A declaration upon a bond need declare upon it only according to its legal effect. (*State v. McGuire*, 822.)

See Executors and Administrators, 10; Guardian and Ward, 4; Municipal Corporations, 9-12; Officers, 8-12.

BONUS.

See Municipal Corporations, 9.

BOYCOTT.

1. CONSPIRACY TO BOYCOTT—INTIMIDATION.—A person has a right to withdraw his own business patronage when he pleases, but he has no right to employ threats or intimidation to divert the patronage of another. (*Boutwell v. Marr*, 746.)

2. CONSPIRACY TO BOYCOTT—UNITED ACTION AS AN UNLAWFUL MEANS.—If it be true, as a general proposition, that

several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. (*Boutwell v. Marr*, 746.)

3. CONSPIRACY TO BOYCOTT—UNITED ACTION—COERCION—REDRESS.—If a person is injured in his business by the withdrawal of patronage through the united action of an association, he is entitled to redress, where the concert of action was procured by coercive measures, such as the imposition of fines and penalties, notwithstanding the voluntary acceptance, by members, of by-laws providing for the imposition of coercive fines. (*Boutwell v. Marr*, 746.)

4. CONSPIRACY TO BOYCOTT—EVIDENCE.—In an action against an association to recover damages for conspiracy to boycott, evidence which tends to characterize the withdrawal of patronage, when made, which shows the existence and rules of a like organization connected with the defendant, and which shows the purpose and use of the association, and its coercive character as against its own members, is admissible. The statements of different defendants, indicative of their purpose, and of members of the association, not defendants, as to the force and effect of a vote upon a resolution to withdraw patronage, made contemporaneously with and in explanation of their action under it, are also admissible. (*Boutwell v. Marr*, 746.)

CAVEAT EMPTOR.

See *Guardian and Ward*; *Judicial Sales*, 2; *Sales*, 1, 2.

CHARITIES.

1. CHARITIES ARE TO BE FAVORED.—GIFTS to charitable uses should be highly favored, and construed by the most liberal judicial rules that the nature of each case, as presented, will admit of, rather than that the gift shall fail and the intent of the donor not be accomplished. (*Harrington v. Pier*, 924.)

2. CHARITIES ORIGINATED BEFORE THE STATUTE OF ELIZABETH.—The common-law system of charities did not originate with, nor was it dependent upon, the statute of 43 Elizabeth, chapter 4. (*Harrington v. Pier*, 924.)

3. CHARITIES INCLUDE WHAT CHARACTER OF WORK.—A charity, with respect to the character of work to be performed, includes everything that is within the letter and spirit of the statute of Elizabeth, considering such spirit to be broad enough to include whatever will promote in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons from among the people as a whole, or a designated class thereof. (*Harrington v. Pier*, 924.)

4. CHARITIES—DEFINITENESS AS TO PURPOSE.—A public charity is sufficiently definite as to purpose, when there is a particular charitable purpose, the general nature of which is clearly stated. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. (*Harrington v. Pier*, 924.)

5. CHARITIES—GIFTS OF PERSONAL PROPERTY.—THE STATUTES of Wisconsin, prohibiting perpetuities and regulating uses and trusts, have no application to gifts of personal property for charitable purposes. A good charitable use is public, and, under

the established doctrine of that state, trusts for charitable uses are distinguished from private trusts. (Harrington v. Pier, 924.)

6. CHARITABLE TRUST.—THE PROMOTION OF "TEMPERANCE WORK," in a designated city, is a proper subject for a charitable trust, and is not void for uncertainty of purpose where the term obviously means work to prevent, so far as practicable, the use of intoxicating liquors. (Harrington v. Pier, 924.)

7. CHARITABLE USES—TRUST FOR—WHAT DOES NOT MILITATE AGAINST.—Indefiniteness of beneficiaries who can invoke judicial authority to enforce a trust for charitable uses, a want of a trustee if there is a trust in fact, indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of the mode of carrying out the particular purpose, does not militate against the validity of such a trust. (Harrington v. Pier, 924.)

8. CHARITABLE USES—TRUST FOR—WHEN GOOD.—A trust for charitable uses is good, with or without a trustee, if there is a particular purpose, such as education or relief of the poor, as distinguished from a bequest to charity generally, and a class, great or small, to be benefited, without regard necessarily to location, as "worthy indigent females," or "indigent young men studying for the ministry," or "resident poor," or "indigent children of Rock county," or "the boys and girls of California." (Harrington v. Pier, 924.)

CHATTEL MORTGAGES.

See Insurance, 13.

CHECKS.

1. CHECKS—EQUITABLE ASSIGNMENT—PREFERENCE.—As between drawer and payee, a check is an equitable assignment of funds in a bank, and the payee will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the drawee. (Dillman v. Carlin, 902.)

2. CHECKS—CONFLICT BETWEEN AND GARNISHMENT.—If a check is given with the intention of transferring a bank credit, but the bank is garnished in a suit against the drawer before the check is presented, the payee is entitled to the fund as against the garnishing creditor. (Dillman v. Carlin, 902.)

See Banks, 3, 4.

CLOUD ON TITLE.

CLOUD ON TITLE—MISTAKE IN DESCRIPTION—SURPLUSAGE.—If premises are described in a mortgage as lot 22, in block 5, according to R.'s map of the city, and known as the H. & H. lot, situated on M. street, but are described in the complaint and subsequent proceedings to foreclose the mortgage as lot 21, in block 5, according to S.'s map of the city, the same being designated as lot 21, in block 17, on R.'s map, and known as the H. & H. lot, situated on M. street, a court will, in an action to quiet title to the property acquired under the foreclosure proceedings, and as against a defendant who appeared and answered therein, treat the description, "lot 21," as surplusage, and disregard it entirely, where it is affirmatively stated in the complaint that there was no such lot as "21," in either block 5 or block 17, because the descriptions in the complaint and other proceedings were sufficient to identify the

property as that described in the mortgage, and neither the defendant nor any other person could have been misled by the mistake in the number of the lot. (*Striegel v. Harding*, 607.)

COLLATERAL ATTACK.

See Judgments, 7, 8.

COMPROMISE.

See Evidence, 12.

CONFLICT OF LAWS.

1. **ACTIONS—LAW GOVERNING FORM OF AND PROCEDURE.**—The form of a remedy and the mode of proceeding are governed by the laws of the place where the action is instituted. (*Murtey v. Allen*, 779.)

2. **STATUTES—EXTRATERRITORIAL FORCE OF.**—The laws of one state, which prescribe a specific remedy for enforcing a liability, have no extraterritorial force, and the courts of another state are not bound to enforce them. (*Murtey v. Allen*, 779.)

3. **ACTIONS—CAUSE CREATED BY STATUTE—COMITY.**—A cause of action unknown to the common law, and existing only by reason of the local statute of a state, cannot be enforced in another state in contravention of its laws. (*Crippen v. Laighton*, 192.)

See Assignment for Benefit of Creditors, 2.

CONSPIRACY.

1. **THE CRIME OF CONSPIRACY CONSISTS** in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means. (*Boutwell v. Marr*, 746.)

2. **CONSPIRACY—CRIME OF—CIVIL ACTION.**—While a mere agreement to effect an illegal purpose or to use illegal means is punishable as a crime, a civil action cannot be sustained therefor unless something causing damage to the plaintiff has been done in furtherance of the agreement. (*Boutwell v. Marr*, 746.)

See Boycott, 1-4.

CONSTITUTIONAL LAW.

See Constitutions; Judges; Marriage and Divorce, 3; Mechanics' Liens, 5, 9; Police Power, 7-9; Taxes, 3.

CONSTITUTIONS.

1. **CONSTITUTIONS.—THE PHRASES "DUE PROCESS OF LAW" AND "THE LAW OF THE LAND"** are synonymous. (*Harbison v. Knoxville Iron Co.*, 682.)

2. **CONSTITUTIONAL LAW.—"DUE PROCESS OF LAW"** is the application of the law as it exists in the fair and regular course of administrative procedure. (*Harbison v. Knoxville Iron Co.*, 682.)

3. **CONSTITUTIONAL LAW.—"LAW OF THE LAND,"** when applied to general legislation, means law which embraces all persons who are or may come into like situation and circumstances. (*Harbison v. Knoxville Iron Co.*, 682.)

4. **CONSTITUTIONAL LAW.—“LAW OF THE LAND,”** when applied to special or class legislation, means not only law which embraces all persons in like situation, but it means that the classification must be natural and reasonable, not arbitrary and capricious. (*Harbison v. Knoxville Iron Co.*, 682.)

5. **CONSTITUTIONS.—THE WORD “LIBERTY,”** as used in a constitutional provision that no person shall be deprived of his liberty without due process of law, means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof. (*Harbison v. Knoxville Iron Co.*, 682.)

6. **CONSTITUTIONAL LAW.—THE WORD “PROPERTY”** as used in a constitutional provision that no person shall be deprived of his property without due process of law, signifies not only those tangible things of which one may be the owner, but everything he may have of an exchangeable value, including the right to acquire and dispose of property, and the right to contract. (*Harbison v. Knoxville Iron Co.*, 682.)

CONTEMPT.

CONTEMPT—VIOLATION OF INJUNCTION.—If the court has authority to grant the writ of injunction, no matter what irregularities may attend the granting thereof, or however erroneously the court may have acted in granting it, so long as the injunction exists, it must be obeyed, and, for a violation thereof, the party violating it must be held in contempt. (*Ex parte Warfield*, 724.)

CONTRACT FOR LIFE.

See Insurance, 15.

CONTRACTS.

1. **CONTRACT WITH MUTUAL CONDITIONS—PLEADING—PERFORMANCE.**—A petition declaring on a contract containing mutual conditions is bad on general demurrer where it contains no allegation of performance, or tender of performance, on the part of the plaintiff. It is not enough to allege a mere willingness and readiness to perform, where there was no attempt to apprise the opposite party thereof. (*Raudabaugh v. Hart*, 361.)

2. **CONTRACTS FOUNDED PARTLY ON AN ILLEGAL CONSIDERATION—VALIDITY OF.**—If a contract is made in part on an illegal consideration, the whole contract is void. Hence, if a defendant, by giving an order, assigns money due, and to become due, to him from his debtor, partly in consideration of a debt honestly due and owing from the assignor to the assignee, but partly given for the purpose of preventing other creditors trusting, and to enable the assignee to take out of the assignor's monthly pay such sum as the debtor sees fit to let him take, the contract, to the extent of the debt, is founded upon a valuable consideration, but beyond this it is in contravention of the statute against fraudulent conveyances and illegal. The whole assignment is therefore void, and the debtor is liable upon trustee process. (*Dow v. Taylor*, 775.)

3. **CONTRACTS HAVING ILLEGAL PURPOSE IN VIEW—ENFORCEMENT OF.**—When an agreement, innocent in itself, is

designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party, nor in favor of the other party, if he is implicated in such design. (*Mound v. Barker*, 767.)

4. **CONTRACTS TO FURTHER AN UNLAWFUL PURPOSE—ILLUSTRATION—ENFORCEMENT.**—When property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal purpose, and does so use it, the rent therefor cannot be recovered. Hence, if the intention is to sell intoxicating liquors upon the premises, contrary to law, and such liquors are sold thereon, to the knowledge of the lessor, a court will not enforce a bond given by a third party to secure payment of the rent. (*Mound v. Barker*, 767.)

5. **CORPORATIONS—RELIEF DEPARTMENT.**—A contract by which an employé of a corporation permits his employer to create a fund in part out of the former's wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employés, or, in case of death, to their beneficiaries, is provided, and by which the employer undertakes to manage the fund, make up deficiencies, and furnish the agreed upon relief, and the employé agrees that the acceptance of such benefits shall operate as a release of all claim against the corporation for damages for injury caused by it, is valid and binding, not opposed to public policy, nor lacking in mutuality or consideration, nor beyond the power of the corporation to make, nor is it an insurance contract. (*Beck v. Pennsylvania R. R. Co.*, 211.)

See *Infants*, 1, 2; *Insurance*, 15; *Mandamus*, 2, 3; *Police Power*, 1; *Vendor and Purchaser*, 4.

CONTRIBUTION.

See *Negotiable Instruments*, 13; *Suretyship*, 1.

CONTRIBUTORY NEGLIGENCE.

See *Negligence*, 4.

CONVERSION.

See *Wills*, 16-18.

CORPORATIONS.

1. **A CORPORATION IS A PERSON** within the meaning of a constitutional provision that no person shall be deprived of life, liberty, or property, without due process of law. (*Harbison v. Knoxville Iron Co.*, 682.)

2. **CORPORATIONS—DIRECTORS AS TRUSTEES—MONEY ACQUIRED BY VIRTUE OF OFFICE.**—Where the president and director of a life insurance company is paid money by outside parties upon the condition that he procure the election of such outside parties as directors of the corporation and that they be given the control and management, with the property, of the corporation, such money is received by virtue of his office and from official acts, and he must account to the corporation for it. (*McClure v. Law*, 262.)

3. **CORPORATIONS—DIRECTORS AS TRUSTEES—DEFENSE.**—Where the president and director of a corporation receives money for the transfer of the control of the corporation to

other parties, it is no defense that such transaction was for the purpose of reimbursing himself and other directors for moneys which they had invested in the purchase of promissory notes issued by the corporation, when such notes were not legally collectible from it. (*McClure v. Law*, 262.)

4. CORPORATIONS.—WHERE MONEY IS ACQUIRED BY A PRESIDENT and director of a life insurance company by virtue of his official acts, he must account for the same, and it is no defense that his acts were illegal and unauthorized. (*McClure v. Law*, 262.)

5. CORPORATIONS—LIEN ON STOCK, RESERVATION OF. If a corporation issues a certificate of stock, containing a stipulation that it shall not be "transferable by any stockholder liable to this company, as principal debtor or otherwise, without consent of the board of directors," it thereby expressly reserves a lien on the stock to secure the debts of the holder to it. (*Stafford v. Produce etc. Banking Co.*, 371.)

6. CORPORATIONS—LIEN ON STOCK—CREATION OF, BY CONTRACT, AND RIGHT TO ASSERT.—One who accepts a certificate of stock issued to him by a corporation organized to do the business of a savings and loan company, and which contains the reservation of a lien upon the stock to secure the payment of his debts, accepts the condition. The lien, therefore, exists by force of a contract, and may be asserted against a transferee who receives the stock before, but does not present it for transfer on the company's books until after, the original holder becomes indebted to the corporation. (*Stafford v. Produce etc. Banking Co.*, 371.)

7. A CORPORATION CAN DO ONLY SUCH ACTS as are within the scope of its charter, and if any particular act was not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act can make it valid by way of estoppel. (*Best Brewing Co. v. Klassen*, 26.)

8. CORPORATIONS—POWER TO BECOME SURETY.—A corporation organized to manufacture and sell beer, ale, and porter, and carry on a general brewing business, has no express or implied power to become a surety on an appeal bond between third parties, unless such act is reasonably necessary to accomplish a purpose for which the corporation was formed. (*Best Brewing Co. v. Klassen*, 26.)

9. CORPORATIONS—ASSESSMENTS ON PAID-UP STOCK.—In the absence of statutory authority, or of express power conferred by the articles of incorporation, there can be no assessment of the fully paid-up stock of a corporation. (*Enterprise Ditch Co. v. Moffitt*, 122.)

10. CORPORATIONS—STATUTE AUTHORIZING ASSESSMENT OF PAID-UP STOCK.—Where neither the statutes of a state nor the articles of incorporation permit the assessment of the fully paid-up shares of stock of a corporation, a statute cannot be passed authorizing the assessment of such paid-up stock, since it would be violative of the accrued, contractual, and property rights of their owners. (*Enterprise Ditch Co. v. Moffitt*, 122.)

11. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDER—LOCAL ACTION TO ENFORCE.—A statute enabling a judgment creditor of a corporation to recover of each stockholder therein an amount equal to the par value of his stock imposes a statutory and not a contractual liability, and the cause of action arising under such statute is purely local, and not transitory. (*Crippen v. Loughton*, 192.)

12. CORPORATIONS—LEGALITY OF CALLS FOR INSTALLMENTS OF "STOCK NOTES."—A call by the directors of a corporation for the several installments of a note given to it in payment for stock is not invalid by reason of the company's failure to elect fifteen directors for the years in which such calls were made, where the charter provided that there should not be less than seven, nor more than fifteen, directors, and, at all times in question, the company had more than seven, and more than a majority of fifteen participated in the vote of the board declaring the installments payable. (*New England Fire Ins. Co. v. Haynes*, 771.)

See Assignment for Benefit of Creditors, 3; Insurance, 15.

COSTS.

See Appeal, 19; Attorneys' Fees.

COTENANCY.

See Limitation of Actions, 2.

COUNSEL FEES.

See Attorneys' Fees.

COURTS.

See Jurisdiction.

CRIMINAL LAW.

See Appeal, 23; Insane Persons, 24.

CURATIVE LAWS.

See Statutes, 16-21.

DAMAGES.

1. DAMAGES.—EXEMPLARY DAMAGES, if ever recoverable against several defendants, are recoverable only where all are shown to have been moved by a wanton desire to injure. (*Boutwell v. Marr*, 746.)

2. DAMAGES—PUNITIVE.—IN A TORT ACTION there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done, and which had some influence in causing it to be done. (*Krug v. Pitass*, 317.)

3. NEGLIGENCE—DAMAGES.—A florist whose plants have been injured by the negligent escape of gas is not entitled to recover special damages for injury to his business reputation on account of his sales of damaged plants, as such damages are too speculative and remote for legitimate compensation. (*Dow v. Winnepesaukee Gas etc. Co.*, 173.)

See Appeal, 15; Attachment, 8, 11; Evidence, 4; Husband and Wife, 1-4; Insurance, 14; Libel, 4; Malicious Prosecution, 2; Nuisance; Railroads, 12-14; Real Property, 4.

DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR—SLAVE DEBT.—A debt incurred in the purchase of slaves is collectible if not barred by limitation. (*Sloan v. Hunter*, 551.)

2. SUBSEQUENT CREDITORS.—Entry of judgment subsequent to a deed and its record does not constitute the judgment creditor a subsequent creditor, unless the debt upon which the judgment is based arose subsequently to the execution of the deed in question. (*McGhee v. Wells*, 567.)

DEDICATION.

MUNICIPAL CORPORATIONS—STREETS—DEDICATION—ESTOPPEL.—A person not the original owner of land, but claiming under a plat and deed by which a street has been dedicated to the public, is estopped from denying such dedication. (*Ralston v. Weston*, 834.)

DEEDS.

See Forgery, 2; Insane Persons, 1; Judgment, 1.

DE FACTO OFFICERS.

See Officers, 2-6.

DEFICIENCY JUDGMENT.

See Mortgages, 3.

DEFINITIONS.

"Due process of law." (*Harbison v. Knoxville Iron Co.*, 682.)

"Lawful issue." (*New York etc. Co. v. Viele*, 238.)

"Law of the land." (*Harbison v. Knoxville Iron Co.*, 682.)

"Learned in the law." (*Jamieson v. Wiggin*, 585.)

"Liberty." (*Harbison v. Knoxville Iron Co.*, 682; *Ruhrstrat v. People*, 30.)

"Property." (*Harbison v. Knoxville Iron Co.*, 682.)

DEPOSITIONS.

EVIDENCE — DEPOSITION — NOTICE OF TAKING.—A deposition taken before A. J. Langley may be admitted in evidence, though the notice was to take testimony before Andrew Langley, provided both parties are represented by counsel at the taking of such testimony. (*Sloan v. Hunter*, 551.)

DISCOUNT.

See Negotiable Instruments, 7.

DIVORCE.

See Marriage and Divorce.

DOGS.

See Animals, 1-3.

DOMICILE.

See Wills, 12, 13.

DUE PROCESS OF LAW.

See Constitutions, 1, 2.

DURESS.

DURESS.—THREATS TO PROSECUTE a man for embezzlement unless his wife executes a mortgage on her separate property to secure his debt constitute duress and avoids her mortgage obtained thereby. (*Mack v. Prang*, 848.)

See Negotiable Instruments, 6.

EASEMENTS.

See Adverse Possession, 4; Highways.

ELECTION.

See Actions.

ELECTRIC COMPANIES.

See Fixtures, 1; Railroads, 10.

EMANCIPATION.

See Fraudulent Conveyances, 3; Parent and Child, 2, 3.

EMINENT DOMAIN.

EMINENT DOMAIN—COMPENSATION FOR STRUCTURE IN HIGHWAY.—Private property cannot be taken or damaged for public use without compensation, and if public officers mislead, either by acts of omission or of commission, a private person into building a costly structure over the line of a public highway, street, or alley, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, they thereby take private property for public use without compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, and must pay the damage to the structure by the removal thereof. This rule does not apply to one who knowingly invades a highway—he must bear the loss occasioned thereby, and not the public. (*Ralston v. Weston*, 834.)

See Railroads, 11-14.

EMPLOYÉS.

See Master and Servant.

EQUITABLE CONVERSION.

See Wills, 16-18.

EQUITY.

EQUITY—REFORMATION OF VOLUNTARY CONVEYANCE.—A voluntary conveyance of land by a father to his adult son, founded on natural love and affection, and made without any prior consultation or agreement with the grantee, as a testamentary disposition of the property, cannot, after the death of the grantor and as against other heirs, be reformed in equity and made to describe the land which the grantor intended but by mistake failed to convey. (*Willey v. Hodge*, 852.)

EQUITY OF REDEMPTION.

See Merger.

ESTATES.

See Merger.

ESTOPPEL.

1. ESTOPPEL—TAKING ADVANTAGE OF ONE'S OWN FRAUD.—A person who gives a note to an incorporated insurance company for the purpose of enabling the corporation to deceive the insurance commissioners of the state as to the company's financial condition, is estopped from taking advantage of his own fraud when sued upon the note by the company. (*New England Fire Ins. Co. v. Haynes*, 771.)

2. ESTOPPEL.—REMAINDERMEN who stand silent while a life tenant, believing that he owns the property in fee, makes permanent improvements on the estate, are not thereby estopped to assert their title after the termination of the life estate when the situation of the title is shown by the records, and the information in regard to it is equally open to both parties. (*Clark v. Parsons*, 157.)

See Dedication; Guardian and Ward, 6; Injunctions, 6; Municipal Corporations, 12.

EVIDENCE.

1. EVIDENCE—JUDICIAL NOTICE OF LAWS OF OTHER STATES.—The courts of one state cannot take judicial notice of the constitution or statutes of another state, nor of their interpretation by the courts of that state. (*Murtey v. Allen*, 779.)

2. EVIDENCE.—PHOTOGRAPHS of an injured foot in variant poses and aggravated aspects, well calculated to arouse the sympathy of the jury, is inadmissible in an action by the husband to recover damages for nursing, medical attendance, and loss of services and society of his wife having such injured foot, when there is other evidence showing the expense and extent of her injury very fully. (*Selleck v. Janesville*, 892.)

3. EVIDENCE.—IF PHOTOGRAPHS ARE NOT SUBSTANTIALLY NECESSARY or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they are inadmissible in evidence. (*Selleck v. Janesville*, 892.)

4. EVIDENCE—OPINION—DAMAGES.—In an action to recover for personal injury, a physician's evidence that the person injured will require future medical attendance by reason of the injury on an average of twice per week is inadmissible as invading the field of baseless conjecture, and as clearly prejudicial on the question of damages. (*Selleck v. Janesville*, 892.)

5. EVIDENCE.—CONGRESS HAS NO POWER to regulate the introduction of evidence in the state courts. (*Thomas v. State*, 740.)

6. EVIDENCE—PAROL TESTIMONY AS TO A PRINTED RULE ON A CARD DESTROYED BY FIRE.—In an action to recover the value of baggage taken to a railway depot for transportation, but which was burned with the station before the train

started, parol evidence of the substance of a rule, printed on a card tacked up in the depot and prohibiting the checking of baggage until within half an hour of train time, is not prejudicial to the plaintiff, who had knowledge of the rule. Furthermore, any objection to parol testimony as to the contents of such card is obviated by proof that it was destroyed in the burning of the station. (*Goldberg v. Ahnapsee etc. Ry. Co.*, 899.)

7. EVIDENCE, PAROL—WHEN ADMISSIBLE, IN CASE OF DOUBT.—As between the original parties to a written instrument, parol evidence, which does not tend to contradict its terms, is admissible to show the intent and meaning of such persons, when there is something on the face of the instrument that suggests a doubt as to the parties bound, and the court cannot, by inspection, determine the question from the paper creating the obligation. (*Small v. Elliott*, 630.)

8. EVIDENCE, PAROL—ADMISSIBILITY OF, TO EXPLAIN SIGNATURE TO GUARANTY.—As between the original parties to a guaranty, parol evidence is admissible, in an action thereon, to explain the character or capacity in which the defendant signed the instrument, where the letters "Pt" follow his signature, for this abbreviation, not usually affixed to signatures, suggests a doubt as to the party bound, and the court cannot determine the question alone by an inspection of the paper. (*Small v. Elliott*, 630.)

9. EVIDENCE—ADMISSIONS—IMPEACHING WITNESS.—The admissions or statements of a party to a suit against his interest, made out of court or upon a former trial relating to a material matter, may be proved without laying the foundation required in impeaching a disinterested witness. (*Churchill v. White*, 64.)

10. EVIDENCE.—EXCLAMATIONS IN SLEEP are not admissible in evidence. Hence, in an action to recover damages for injuries resulting to a boy from the bite of an alleged vicious dog, it is error to permit the boy's father to testify that the first two or three nights after the boy was bitten he would, when dropping into a drowse, jump up and call, "Take him off, he is biting me!" Such testimony is hearsay. (*Plummer v. Ricker*, 757.)

11. EVIDENCE—RES GESTAE.—SUDDEN EXCLAMATIONS AND OUTBURSTS OF BYSTANDERS, as well as of participants, are parts of the *res gestae*, and as such may properly be introduced in evidence whenever the occurrence producing them is undergoing judicial investigation. Hence the conduct of the plaintiff's children when he is ejected from a street-car forms a part of the *res gestae*, and is admissible in evidence in a suit against the company. (*O'Rourke v. Citizens' St. Ry. Co.*, 639.)

12. EVIDENCE—COMPROMISE.—Statements made in the course of negotiations looking to a compromise cannot be admitted in evidence against the party making them, if the effort to compromise proves abortive. (*Robertson v. Blair*, 543.)

13. EVIDENCE—HEARSAY.—If a witness testifies as of his own knowledge, the testimony cannot be excluded as hearsay, unless that fact is made to appear, although there is great probability that the information is really hearsay. (*Sloan v. Hunter*, 551.)

14. EVIDENCE—INTENT.—One may testify as to the intent with which he did an act charged as fraudulent. (*McGhee v. Wells*, 567.)

15. TRIAL—EVIDENCE OF OWNERSHIP.—It is competent to prove by parol evidence the ownership of a building where it does not appear that the building was realty. (*Knights v. State*, 78.)

16. EVIDENCE—ACTS OF OWNERSHIP AFTER AN ACCIDENT.—Where the plaintiff's evidence raises a disputable presumption that the defendant was the owner of a barbed wire fence prior to an injury caused thereby, the admission of evidence tending to show that after the injury the defendant continued to exercise acts of ownership is harmless. (*Siglin v. Coos Bay Co.*, 463.)

17. TRIAL—EVIDENCE OF OTHER CRIMES.—Where a defendant is on trial for a specific offense, evidence of other similar offenses committed about the same time is admissible for the purpose of establishing the criminal intent of the accused. (*Knights v. State*, 78.)

See Animals, 3; Appeal, 10, 23; Arson; Boycott, 4; Depositions; Extradition, 4; Fraudulent Conveyances, 7, 8; Homicide, 6, 7; Insurance, 14; Libel, 1; Mines, 1, 2; Municipal Corporations, 13, 14; Negotiable Instruments, 11; Parent and Child, 3; Rape, 2-4; Real Property, 6; Seduction, 3; Witnesses.

EXCEPTIONS.

See Appeal, 5, 22.

EXECUTION.

See Attachment, 10.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS ARE REQUIRED to exercise only ordinary care and reasonable diligence. An administrator is only required to pursue such course in the management of the intestate's assets as a judicious man, looking alone to his own interests, would, under the circumstances, pursue in his own affairs. (*Harris v. Orr*, 815.)

2. EXECUTORS AND ADMINISTRATORS ARE NOT LIABLE FOR LOSSES to the estate in the absence of willful misconduct or fraud, especially when acting under the advice of counsel, and in no case are they insurers nor liable for an error in judgment. (*Harris v. Orr*, 815.)

3. EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO SUE on a worthless debt, and ordinary care and prudence constitute the true criteria of their duty. (*Harris v. Orr*, 815.)

4. EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO ENFORCE a doubtful or controverted demand or claim, merely because the heirs may think it well founded, unless they are willing to give indemnity for costs. (*Harris v. Orr*, 815.)

5. EXECUTORS AND ADMINISTRATORS—JUDGMENT AGAINST—EFFECT ON SURETIES.—A judgment against an executor for a debt, or a decree for a balance in his hands, is prima facie evidence against the sureties in his bond, and is conclusive against them as to the existence and justness of the demand. (*Crim v. England*, 826.)

6. EXECUTORS AND ADMINISTRATORS.—REASONABLE FEES PAID COUNSEL are always allowed as credits to an administrator, and, if not paid by him, are a lawful charge against the assets of the estate in his hands. (*Crim v. England*, 826.)

7. EXECUTORS AND ADMINISTRATORS—ATTORNEYS' FEES—LIABILITY OF SURETIES.—If attorneys' fees for services rendered an administrator during administration are regularly al-

lowed by the court and payment directed out of assets found to be in the hands of such administrator, such fees are a valid demand against the sureties in his bond. (Crim v. England, 826.)

8. EXECUTORS AND ADMINISTRATORS—LIABILITY—NOTES AS DISCHARGE.—A valid demand against the assets of a decedent is not discharged by notes given by the administrator therefor, signed by him with the addition to his name of the words, "Administrator of Trahern, deceased." (Crim v. England, 826.)

9. EXECUTORS AND ADMINISTRATORS—NOTICE TO MINOR HEIRS—GUARDIAN AD LITEM.—The appointment of an administrator de bonis non of an intestate estate, without notice to or the appointment of a guardian ad litem for minor heirs is void, though the appointment of such administrator is made through the application of their general guardian, and a subsequent order of court allowing a guardian ad litem to file an appearance on behalf of such minors nunc pro tunc does not validate the appointment. (Hubbard v. Chicago etc. Ry. Co., 855.)

10. EXECUTORS AND ADMINISTRATORS—BONDS.—An instrument purporting to be an administrator's bond, which is signed by the principal and sureties and approved and filed by the probate court, but which names no person or officer as obligee, is neither a statutory nor a common-law bond. It is simply a promise in writing made to no one, and is void. (Tidball v. Young, 98.)

See Appeal, 12; Guardian and Ward, 8.

EXEMPLARY DAMAGES.

See Damages.

EXEMPTION.

See Attachment, 10; Homesteads, 1; Process.

EXPERT TESTIMONY.

See Witnesses, 10.

EXTRADITION.

1. EXTRADITION—HABEAS CORPUS—QUESTIONS OPEN TO INQUIRY.—When a prisoner, held under an extradition warrant, applies for a writ of habeas corpus in the state upon which demand is made, the court or judge authorized to issue the writ is not conclusively bound by the action of the executive in issuing his extradition warrant. He may, therefore, upon the hearing of the writ, inquire as to whether or not an offense was charged, whether or not the relator was a fugitive from justice, and whether or not the governor's warrant was, in fact, issued by him. (In re Tod, 616.)

2. EXTRADITION—CHARGE OF CRIME—NECESSITY OF. The affidavit, indictment, or information upon which it is sought to hold a party in a proceeding for extradition must charge a public offense, and, upon habeas corpus, this is a question of law for the court or judge to determine. (In re Tod, 616.)

3. EXTRADITION—FUGITIVE FROM JUSTICE—REQUIREMENT.—In extradition proceedings, it must appear that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand, and this fact should be cited in the extradition warrant. (In re Tod, 616.)

4. EXTRADITION—FUGITIVE FROM JUSTICE—EVIDENCE. The question as to whether or not a person demanded as a fugitive

from justice is such is one of fact, which the governor of the state upon whom the demand is made must decide; upon such evidence as he may deem satisfactory, but the *prima facie* case made by the issuance of his warrant, that the person is a fugitive from justice, may, on habeas corpus, be overthrown by proof to the contrary. (In re Tod, 616.)

5. EXTRADITION—FUGITIVE FROM JUSTICE—WHO IS NOT.—A person charged with false pretenses in a transaction with a mining company in another state is not a fugitive from the justice of that state, where he came to this state, but afterward returned to such other state, where a final settlement was had with the company, and again came to this state, each trip having been made upon the company's request. (In re Tod, 616.)

6. EXTRADITION.—THE DUTY OF EXAMINING REQUISITION PAPERS, passing upon their validity, and of issuing a warrant, devolves upon the governor personally, and he cannot delegate it to any other person. (In re Tod, 616.)

FENCES.

See Negligence, 4; Real Property, 6.

FINDINGS.

See Appeal, 2-4.

FIXTURES.

1. FIXTURES—ELECTRIC LIGHT PLANT.—A dynamo and appurtenant machinery leased to an electric light company by the manufacturer under a contract whereby the rental is to be applied to the purchase price of that or a larger dynamo which the company has an option to purchase within a certain time, kept in place by being screwed to timbers spiked to the floor of the company's building, moved from time to time, and operated by belts from shafting firmly attached to the floors of the building, after the execution of a mortgage, by the company on the premises, become fixtures, and pass to the purchaser under foreclosure of the mortgage after the expiration of the option. (Gunderson v. Swarthout, 860.)

2. FIXTURES.—MACHINERY attached to and adapted to the purpose to which the realty is devoted, and used for the permanent improvement of the freehold, is a fixture and part of the realty; but if it is attached for a mere temporary use, with the present intention of removal, it continues to be personal property. (Gunderson v. Swarthout, 860.)

FLAG.

See Statutes, 4, 7.

FOREIGN JUDGMENT.

See Judgments, 9; Jurisdiction, 2; Limitation of Actions, 3, 4; Marriage and Divorce, 2-4.

FOREIGN RECEIVERS.

See Receivers, 2-4.

FORGERY.

1. **FORGERY—ALTERATION OF INSTRUMENT—INSTRUCTIONS.**—On a trial for having in possession a forged deed with intent to pass it, in the absence of allegations of forgery by alteration, there is no basis for instructions on the theory that the forgery consisted in altering a genuine instrument. (*Johnson v. State*, 742.)

2. **FORGERY—DEED TO HOMESTEAD.**—A homestead cannot be conveyed without the consent of the wife, and not even then unless her privy acknowledgment has been taken to the deed. Hence a deed of a homestead, which is also the separate property of the wife, and which does not show affirmatively her privy examination and acknowledgment, is not the subject of forgery. (*Johnson v. State*, 742.)

3. **FORGERY—UNSTAMPED INSTRUMENT.**—An instrument required by statute to be stamped is not per se void for want of such stamp, and is the subject of forgery. (*Thomas v. State*, 740.)

See *Banks and Banking*, 3, 4.

FRATERNAL SOCIETIES.

See *Mandamus*, 4.

FRAUD.

See *Attachment*, 4, 5; *Estoppel*, 1; *Fraudulent Conveyances*; *Merger*, 3; *Mortgages*, 8, 9; *Sales*, 8-10.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES.**—A confession of judgment on a debt incurred in the purchase of slaves, a sale of the debtor's land at a fair price, and an agreement between the purchasing creditor and the debtor before the sale to permit the latter to redeem and to remain in possession, do not amount to a fraud on his other creditors. (*Sloan v. Hunter*, 551.)

2. **FRAUDULENT CONVEYANCES.**—A CONVEYANCE OF LANDS WITHOUT A VALUABLE CONSIDERATION by one who is indebted at the time is presumptively a fraud upon his creditors, who have an equitable right to set it aside or to avoid it, at least to the extent of the debts due them. (*Flynn v. Baisley*, 495.)

3. **FRAUDULENT CONVEYANCES.**—WHERE A PARENT IN GOOD FAITH EMANCIPATED HIS SONS while he was in good financial circumstances, and thereafter, during their minority, they earned money which they loaned to him, a conveyance of real estate by the father to his sons in consideration of such loans is made upon a valuable consideration, and will not be set aside as being in fraud of creditors. (*Flynn v. Baisley*, 495.)

4. **FRAUDULENT CONVEYANCES — PREFERENCES.** — A FRAUDULENT VENDEE may, without authority from his vendor, prefer one of the latter's creditors. (*Longfellow v. Barnard*, 117.)

5. **FRAUDULENT CONVEYANCES — PREFERENCES.** — A debtor in failing circumstances may prefer his creditor by a confession of judgment, provided he does not thereby intend to delay or defraud his other creditors, and does not thereby secure to himself a direct advantage at the expense of his creditors. (*Sloan v. Hunter*, 551.)

6. FRAUDULENT CONVEYANCES—ACTION TO ANNUL—PARTIES.—In an action to set aside a confession of judgment and deed thereunder as a fraud on creditors of the judgment defendant, the party in possession and the administrator and heir at law of the judgment creditor are necessary parties. (*Sloan v. Hunter*, 551.)

7. FRAUDULENT CONVEYANCES—EVIDENCE.—DECLARATIONS made by a husband at the time of accepting a deed as to whose money was being paid therefor, and also the declaration of his attorney made at the time that the husband could convey to his wife, are competent evidence to show the character of the husband's possession, in an action to set aside the deed made by the husband to the wife, as in fraud of his creditors. (*McGhee v. Wells*, 567.)

8. FRAUDULENT CONVEYANCES—BADGES OF FRAUD.—If a husband while in debt conveys property to his wife, his retention of its possession is a badge of fraud, as are also the non-delivery of the deed to the wife and the delay in recording it. (*McGhee v. Wells*, 567.)

9. FRAUD.—INADEQUACY OF PRICE does not mean an honest difference of opinion as to price, but a consideration so far short of the real value of the property as to startle a correct mind. (*McGhee v. Wells*, 567.)

10. HOMESTEAD—FRAUDULENT TRANSFER OF.—A conveyance by a husband to his wife of premises occupied by them as a homestead, made without consideration, and for the purpose of defeating existing and subsequent creditors in case the family should remove therefrom, and, with other funds, purchase and occupy a different homestead, is fraudulent as to creditors, where such contrivance has been carried out. (*Kettleschlagler v. Ferrick*, 623.)

See Mortgages, 8, 9.

GAMING.

1. GAMING—RECOVERING PROPERTY LOST AT.—If a person loses specific property at gaming, and afterward peaceably regains possession of it, he may retain it against the winner. (*Stanford v. Howard*, 635.)

2. GAMING—RECOVERING MONEY—NOTE GIVEN FOR RETURN OF.—Where money lost in a gambling transaction is returned to the owner under the pretense of a promise to repay it, and a note is given for the amount, the transaction amounts to a peaceable recapture of the money, which the loser may retain, and the note is not collectible. This is especially true where the state statutes permit a loser to recover property lost at gaming. (*Stanford v. Howard*, 635.)

GARNISHMENT.

See Attachment, 11-13; Checks, 2.

GAS COMPANIES.

1. NEGLIGENCE—ESCAPE OF GAS—WANT OF NOTICE AS DEFENSE.—In an action to recover for injuries caused by the escape of gas from a defective pipe, it is no defense that the owners were not notified of its condition. (*Dow v. Winnepesaukee Gas etc. Co.*, 173.)

2. NEGLIGENCE—DEFECTIVE GASPIPE.—Persons who acquire title to a gaspipe immediately become chargeable, as its owners and users, with the personal duty to keep it in a reasonable

condition of safety, and so use it as not unnecessarily to injure the property or endanger the safety of others, and if they fail to do so, they are liable for the consequences in the same manner and to the same extent as if they had laid the pipe themselves, and the question of their liability is not dependent upon their knowledge of the pipe's defective condition or the escaping gas, but upon the observance of or neglect of care by them. (*Dow v. Winnepesaukee Gas etc. Co.*, 173.)

GIFTS.

1. **GIFTS BETWEEN PARENT AND CHILD.**—If a father orally gives his son before the former contracts a debt an undivided half of a tract of land, saying that it is to be the west end of the tract, the gift is sufficiently certain and definite, and may be enforced free from such debt if the donee has made valuable improvements. (*Crim v. England*, 826.)

2. **GIFTS — CONSIDERATION — POSSESSION — IMPROVEMENTS.**—If a gift of land is made orally on a meritorious consideration, mere delivery of possession does not render the gift enforceable, but if, on the faith of the gift, the donee makes valuable improvements, the gift may be enforced in equity by a conveyance of the legal title. (*Crim v. England*, 826.)

See Charities.

GUARANTY.

ONE WHO SIGNS A GUARANTY AS PRESIDENT OF A BANK IS PERSONALLY LIABLE thereon, unless he shows that the bank had power to execute guaranties and that he was authorized to execute the one sued upon. (*Small v. Elliott*, 630.)

See Evidence, 8.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—PURCHASE OF PROPERTY BY SOCAGE GUARDIAN.**—A mother of infants, who, upon the death of their father intestate, becomes their guardian in socage, and has the custody of the infants' interests in the real estate, and who has also a personal interest in the lands as dowress, can at a foreclosure sale protect her own interest and the common interest of herself and children by purchasing the property in her own name. She thereby obtains a good legal title which she can convey to a grantee, who cannot be held responsible for her application of the proceeds of the property. (*Boyer v. East*, 290.)

2. **GUARDIAN AND WARD—GUARDIAN AD LITEM CANNOT PURCHASE WARD'S PROPERTY.**—The provision of a statute that "a guardian of an infant party to the action shall not purchase or be interested in the purchase of any of the property sold" relates only to guardians ad litem and does not refer to guardians in socage. (*Boyer v. East*, 290.)

3. **GUARDIAN AND WARD — AVOIDING GUARDIAN'S PURCHASE—LACHES.**—Where a socage guardian purchases the property of the guardianship at a foreclosure sale, and at the time of such sale the infant wards were of a sufficient age to be, and were more or less, conversant with such purchase, a delay of eight years after the youngest infant has attained his majority before making any objection to the purchase is such laches as bars relief as against subsequent grantees. (*Boyer v. East*, 290.)

4. **GUARDIAN AND WARD—BONDS—SALE OF WARD'S REAL PROPERTY.**—A statute providing that a guardian licensed to sell real estate "shall, before the sale, give bond to the judge of the district court with sufficient surety or sureties, to be approved by such judge." is mandatory, and where the bond given by the guardian was not approved by the judge of the district court, the guardian's sale of his ward's real estate is void. (*Bachelor v. Korb*, 70.)

5. **GUARDIAN AND WARD—GUARDIAN'S OATH—SALE OF PROPERTY.**—The failure of a guardian, licensed to sell his ward's real estate, to take and subscribe an oath "before fixing on the time and place of sale," as required by statute, renders the sale, if made, void. (*Bachelor v. Korb*, 70.)

6. **GUARDIAN AND WARD—GUARDIAN'S SALE—ESTOPPEL OF WARD.**—The fact that the proceeds of a guardian's sale are applied toward the maintenance and education of the wards does not estop them from denying the validity of the sale. (*Bachelor v. Korb*, 70.)

7. **GUARDIAN'S SALE.—THE DOCTRINE OF CAVEAT EMPTOR** applies to purchasers at guardians' sales. Hence one who purchases real estate at a guardian's sale or purchases from the vendee of that sale must take notice at his peril of the authority of the guardian to make the sale. (*Bachelor v. Korb*, 70.)

8. **ESTATES—GUARDIAN AD LITEM.**—The functions of a guardian ad litem appointed to represent minor heirs in the general administration of an intestate's estate terminate with the final settlement of such estate, unless continued by order of court. (*Hubhard v. Chicago etc. Ry. Co.*, 855.)

See Executors and Administrators, 9.

HABEAS CORPUS.

1. **HABEAS CORPUS—JURISDICTION.**—The court of criminal appeals of Texas has jurisdiction to issue writs of habeas corpus on account of contempt proceedings before district courts in the trial of civil cases. (*Ex parte Warfield*, 724.)

2. **HABEAS CORPUS—JURISDICTION.**—The court of criminal appeals of Texas can interfere by habeas corpus in contempt proceedings only when it clearly appears that the action of the lower court punishing for the contempt was without authority of law, and absolutely void because such court had no jurisdiction of the subject matter or the parties, or was wholly without power to make the order in that particular case. (*Ex parte Warfield*, 724.)

See Extradition, 1.

HACKMEN.

See Railroads, 15.

HEALTH OFFICERS.

See Police Power, 6.

HIGH-WATER MARK.

See Waters and Watercourses, 2.

HIGHWAYS.

EASEMENTS — HIGHWAYS—NUISANCE—ABATEMENT. The public easement in all of the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith by private interests is a continuing public nuisance, subject to abatement whenever the growing necessities of the people require such easement for the uses to which the land to which it attaches was originally dedicated. (*Ralston v. Weston*, 834.)

See Adverse Possession, 3, 4; Eminent Domain; Injunctions, 6.

HOMESTEADS.

1. **HOMESTEAD—EXEMPTION OF PROCEEDS OF.**—Under a statute excepting from trustee process the proceeds of property exempt from attachment at the time of its sale, the proceeds of a homestead are not subject to attachment by trustee process. The exemption depends upon whether the property was, at the time of its sale, exempt from attachment, and is not dependent upon the debtor's continuing to be a housekeeper, or upon his intention to acquire another homestead, or upon the intent with which he keeps the proceeds. (*Locke v. Post*, 778.)

2. **HOMESTEAD—MORTGAGE FORECLOSURE—APPOINTMENT OF RECEIVER.**—While, under some circumstances, a receiver may be appointed, in an action to foreclose a mortgage, though the property is a homestead, yet under a statute which declares that the homestead right is subject to be disturbed only through some voluntary act of the parties who might be entitled to it, and then alone by execution or forced sale, a mortgagor cannot be deprived of the enjoyment of his homestead right by the appointment of a receiver. (*Chadron Loan etc. Assn. v. Smith*, 108.)

3. **HOMESTEADS — VENDOR'S LIEN.**—A statute providing that if the owner of a homestead shall die not having devised it, it shall descend "free of all judgments and claims against such deceased owner or his estate, except mortgages lawfully executed thereon and laborers' and mechanics' liens," abolishes the right to acquire a vendor's lien on homesteads, and the right to enforce such lien thereon is lost by the death of the owner of the homestead. (*Berger v. Berger*, 877.)

See Forgery, 2; Fraudulent Conveyances, 10.

HOMICIDE.

1. **HOMICIDE — PROVOKING DIFFICULTY — SELF-DEFENSE.**—In order to have provoked the difficulty, the defendant, charged with murder, must have willingly and knowingly have used some language or have done some act after meeting his antagonist reasonably calculated to lead to an affray or deadly conflict, and unless such act was clearly calculated and intended to have such effect, the right of self-defense is not compromised, even though the defendant armed himself and went there for the purpose of a difficulty. (*Airhart v. State*, 736.)

2. **HOMICIDE — SELF-DEFENSE — INSTRUCTIONS.**—On a trial for murder where self-defense is set up, the disparity in size of the parties is important only in determining what an ordinarily prudent man in the position of the accused would have done under the circumstances, and if these considerations have been fully submitted to the jury, it is not error to refuse an instruction that, "in

the assault of a powerful man upon a weaker, the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances." (*Perugi v. State*, 865.)

3. **HOMICIDE — MANSLAUGHTER — INSTRUCTIONS.**—Manslaughter in the second degree is, where one unnecessarily kills another while resisting an attempt by such other to commit some unlawful act, and the fact that just before the killing the deceased had "tried to grab" the accused does not require the submission to the jury of the question whether the killing was manslaughter in the second degree, if all of the circumstances show that the killing was not done in resisting such assault. (*Perugi v. State*, 865.)

4. **MANSLAUGHTER IN THE THIRD OR FOURTH DEGREE** is where one kills another in the heat of passion. If the evidence fails to show the element of heat of passion, there is no foundation upon which to base a submission of this degree of homicide. (*Perugi v. State*, 865.)

5. **HOMICIDE — MURDER—PREMEDITATION.**—Every homicide, not justifiable, perpetrated with a design and determination to kill distinctly formed in the slayer's mind, is murder in the first degree, though the killing follows instantly the formation of such intention and determination. (*Perugi v. State*, 865.)

6. **HOMICIDE—EVIDENCE.**—On a trial for murder, the testimony of a physician is not admissible to show that a blow inflicted by the accused on the head of the deceased would not have caused his death but for the inflamed condition of his brain, caused by the excessive use of intoxicating liquors. If such blow was the proximate cause of the death, the physical condition of the deceased at the time is immaterial. (*Griffin v. State*, 718.)

7. **HOMICIDE — EVIDENCE — DECLARATIONS AS RES GESTAE.**—If, within a few minutes after the accused had struck a fatal blow with a beer glass, he, being much excited at the time, declared to the first persons that he met, while speaking of the deceased, that, "I hope that I haven't hurt him much," "I did not think that the glass was heavy enough to knock him down," "I just wanted to keep him from kicking me any more," such declarations are part of the *res gestae* and admissible as such. (*Griffin v. State*, 718.)

8. **HOMICIDE—INSTRUCTIONS.**—If it appears that a homicide was the result of a sudden quarrel, that the deceased struck the first blow, and that the defendant then threw a beer glass at the deceased, striking him on the head with fatal effect, the facts do not warrant a charge upon homicide inflicted in a cruel manner, or under circumstances showing an evil or cruel disposition. (*Griffin v. State*, 718.)

9. **HOMICIDE—INSTRUCTIONS.**—If a homicide is committed upon a sudden quarrel and by the defendant throwing a beer glass at the deceased, with fatal effect, after first being struck by the latter, the jury must be instructed that if it believes that the weapon used was not likely to produce death, it cannot be presumed that death was designed, and that before conviction could be had of any degree of culpable homicide the jury must believe from the manner in which the weapon was used that it was evidently intended by the accused to take the life of the deceased. (*Griffin v. State*, 718.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND—MEASURE OF DAMAGES.—In an action by a husband to recover for the loss of his wife's services on account of personal injury, his recovery is not limited to the proved money value of her services as a hired servant, and he may also recover for the loss of wifely services such as are due from her, including her society and assistance. (*Selleck v. Janesville*, 892.)

2. HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND.—If a wife is bedridden or compelled to move on crutches, suffering severe pain, with shattered nerves, as the result of personal injury, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, even other than physical, which would otherwise have been within her power. (*Selleck v. Janesville*, 892.)

3. HUSBAND AND WIFE—INJURY TO WIFE—RECOVERY BY HUSBAND—CARE IN EMPLOYMENT OF PHYSICIAN.—If the husband of an injured wife uses reasonable care in the employment of physicians of good reputation to attend her, he is not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure, nor is he thereby precluded from recovering all the damages sustained from such injury. (*Selleck v. Janesville*, 892.)

4. HUSBAND AND WIFE—PERSONAL INJURY TO WIFE—RECOVERY BY HUSBAND.—A husband may recover for the value of his own necessary services in attendance upon his wife, who has received personal injury at the hands of another. Such recovery must be limited to the amount for which he could have procured such attendance by others. (*Selleck v. Janesville*, 892.)

5. HUSBAND AND WIFE—INJURY TO WIFE—RES JUDICATA.—A recovery by the wife for personal injury to herself, her husband not being a party to the action nor interested therein, is not *res judicata* as to his right to recover for the damages resulting to him from such injury to his wife. (*Selleck v. Janesville*, 892.)

See Injunctions, 4, 5.

INDEPENDENT CONTRACTOR.

See Master and Servant, 5, 6.

INFANTS.

1. INFANTS—CONTRACT AND TORT LIABILITY.—Ordinarily, an infant is not liable on his contracts, except for necessities, but he is liable for his torts, notwithstanding they may have arisen out of, or in some way may have been connected with, a contract. (*Churchill v. White*, 64.)

2. INFANTS—LIABILITY FOR TORT.—An infant who hires a team to go to a designated place, but departs from his contract and drives to a different place and in another direction, and injures the team and carriage, is liable therefor. (*Churchill v. White*, 64.)

3. INFANCY—PRESUMPTION.—In an action by an infant to recover for an injury received by coming in contact with dangerous machinery, there is no presumption that he was incapable of appreciating the danger or of exercising the care necessary to avoid it. (*Buch v. Amory Mfg. Co.*, 163.)

See Judgments, 2-5; Negligence, 2.

INJUNCTIONS.

1. INJUNCTIONS—JURISDICTION.—Courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance, if the party shows himself entitled to the writ under equity rules, and if a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act done or threatened during the litigation, whether this has regard to property in issue or some personal right dependent on some personal act or conduct, the court may grant the writ. (Ex parte Warfield, 724.)

2. INJUNCTIONS—JURISDICTION.—In actions purely legal, of which courts of law have exclusive cognizance, there is no jurisdiction to issue a writ of injunction. (Ex parte Warfield, 724.)

3. INJUNCTION—JURISDICTION.—In cases where it is doubtful whether the action is one at law or of equitable cognizance, as a general rule, if the case is brought into an equity court, the chancellor has the same power to issue a writ of injunction as if there was no question of jurisdiction, and as long as the writ continues it must be obeyed, and its disobedience is a contempt. (Ex parte Warfield, 724.)

4. INJUNCTIONS—ALIENATION OF WIFE'S AFFECTIONS. In an action for damages for the partial alienation of a wife's affections, an injunction may be granted to prevent the defendant, who is exercising undue influence over such wife, and who, if not restrained, is likely to lead her entirely astray, from writing to, speaking to, or talking with her, or from visiting the house where such wife is staying. (Ex parte Warfield, 724.)

5. INJUNCTIONS—VIOLATION—ALIENATION OF WIFE'S AFFECTIONS.—If, in an action for damages for a partial alienation of a wife's affections, an injunction has been granted restraining the defendant from writing or speaking to such wife, it is a violation thereof for such defendant to have a conversation with such wife, even though it is not shown that such conversation was of such character as to persuade or lead her away from her husband. (Ex parte Warfield, 724.)

6. INJUNCTION AGAINST ASSESSMENT FOR PUBLIC IMPROVEMENT—STATUTE—CHANGE OF JUDICIAL CONSTRUCTION—OBLIGATION OF CONTRACTS—ESTOPPEL.—When it appears that an assessment was levied under a legislative act to pay for a public improvement in a county, such as the opening and improvement of a highway, and it is assumed that the law, at the time of its enactment, and of the contemplated improvement, was believed, under former decisions of the supreme court, to be valid, but which is conceded to be unconstitutional, if tested by recent decisions of that court, that the improvement was beneficial to the public, but of special benefit to a few owners in the assessment district defined in the act, upon whom it was sought to impose the burden of making the improvement, to the relief of the county, whose representatives secured the passage of the act, such owners, where they did not actively promote the improvement in any way, may, when an attempt is made to enforce the assessment, enjoin its collection, although they knew of the improvement and of the intention to make the assessment, for an attempt to enforce it does not involve any rights arising out of contract, and the owners are not, therefore, estopped, under the circumstances, to deny its validity. (Lewis v. Symmes, 428.)

7. MUNICIPAL CORPORATION — RIGHT TO REMOVE BUILDINGS FROM.—An injunction will not issue, at the instance

of taxpayers of a town, to restrain the owner of a building therein from removing it therefrom, though the burden of taxes on the other residents will be thereby increased. (*St. Lawrence v. Gross*, 612.)

See Contempt.

INSANE PERSONS.

1. INSANITY—DEED OF INSANE PERSON—CANCELLATION—RESTORATION OF CONSIDERATION.—A deed executed by a person without legal capacity for whom a conservator is afterward appointed cannot be set aside without restoration of the purchase money paid by the grantee, or property parted with, if such grantee had no notice or knowledge of the grantor's infirmity, or of any undue influence by the party to whom he has conveyed the property. In such case, inadequacy of price may justify setting aside the conveyance, but not without a return of the money paid or property conveyed in consideration therefor. (*Eldredge v. Palmer*, 59.)

2. CRIMINAL TRIAL—INSANITY—BURDEN OF PROOF. In a criminal prosecution the law presumes sanity, but when the defendant produces evidence tending to prove insanity, the law then imposes on the state the burden of establishing the sanity of the accused, the same as any other material fact necessary to warrant a conviction. (*Knights v. State*, 78.)

3. CRIMINAL TRIAL—INSANITY—WHEN SUFFICIENT TO ACQUIT.—There is no criminal responsibility where at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing wrong. (*Knights v. State*, 78.)

4. CRIMINAL TRIAL—INSANITY.—AN INSTRUCTION is erroneous which tells the jury to acquit the defendant on the ground of insanity only when he was incapable both of understanding the nature of his act, and of distinguishing between right and wrong with respect to that act. (*Knights v. State*, 78.)

INSOLVENCY.

See Attachment, 5.

INSTRUCTIONS.

1. INSTRUCTIONS MUST BE TAKEN AS A WHOLE, and if, considering the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery or a defense, is not embraced in each paragraph, where the paragraph excepted to is not in itself calculated to mislead. (*Ohio etc. Torpedo Co. v. Fishburn*, 437.)

2. TRIAL.—INSTRUCTIONS during the examination of a witness that a question of resulting trust, erroneously submitted to the jury at a former trial was not to be considered, but that the question of fraud was, is not a charge upon the facts. (*McGhee v. Wells*, 567.)

See Appeal, 7; Attachment, 9; Forgery, 1; Homicide, 2, 3, 8, 9; Rape, 5.

INSURANCE.

1. **ACCIDENT INSURANCE—OVEREXERTION.**—An accident insurance policy, exempting the insurance company from liability for injuries caused by voluntary overexertion, does not deprive the insured of his right to indemnity because his injury resulted from overexertion, unless the overexertion was conscious and intentional. (*Rustin v. Standard Life etc. Ins. Co.*, 136.)

2. **ACCIDENT INSURANCE—OVEREXERTION.**—The lifting of a three hundred pound dumb-bell is not, as a matter of law, an act of such conscious and intentional overexertion as to deprive an insured of his right to indemnity by reason of such act. (*Rustin v. Standard Life etc. Ins. Co.*, 136.)

3. **ACCIDENT INSURANCE — OVEREXERTION — NEGLIGENCE OF INSURED.**—Where an accident insurance policy exempts the company from liability for injuries caused by voluntary overexertion, mere contributory negligence on the part of the insured in regard to such overexertion is no defense to an action on the policy. (*Rustin v. Standard Life etc. Ins. Co.*, 136.)

4. **INSURANCE — DEATH BY SUICIDE — PRESUMPTION AGAINST.**—If death results under such circumstances that it may or may not have been caused by suicide, the presumption is against death by suicide, but this presumption is rebuttable and easily yields to physical facts clearly inconsistent with it. (*Agan v. Metropolitan Life Ins. Co.*, 905.)

5. **INSURANCE—OVERCOMING PRESUMPTION OF DEATH BY SUICIDE.**—The presumption against death by suicide is overcome by proof of circumstances pointing to, and consistent with, the theory of suicide, and inconsistent with any other reasonable theory, particularly where all the reasonable probabilities are in favor of suicide. (*Agan v. Metropolitan Life Ins. Co.*, 905.)

6. **INSURANCE—FIRE—UNOCCUPIED BUILDING.**—Under a fire insurance policy providing that it shall be null "if the building be or become vacant or unoccupied and so remain for ten days," the fact of vacancy does not per se annul the contract, but merely gives the insurer the right to treat it as void, which right may be waived. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

7. **INSURANCE — FORFEITURE OF POLICY — WAIVER.**—Where there has been a breach of a condition in an insurance policy providing for a forfeiture, a waiver of such breach when once made is irrevocable, and the waiver, to be effective, need not be based on either a new agreement or an estoppel. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

8. **INSURANCE — POWER OF AGENT—WAIVER OF FORFEITURE.**—The election of an insurance agent, acting within the scope of his authority, to waive the right of the insurance company to take advantage of a forfeiture, is binding upon the company. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

9. **INSURANCE—FORFEITURE OF POLICY—RENEWAL.**—If an insurer claims a forfeiture of an insurance policy by reason of a breach of the contract, the policy ceases to exist, and cannot be reanimated except by the mutual consent of the contracting parties. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

10. **INSURANCE—FORFEITURE OF POLICY—UNEARNED PREMIUM.**—If an insurer takes advantage of a forfeiture of an insurance policy, there is no unearned premium which the insured is entitled to receive. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

11. **INSURANCE—ORAL CONTRACT TO RENEW POLICY.**—Where insurance agents, authorized "to countersign, issue, and re-

new policies of insurance" agree orally to continue an existing contract of insurance and issue a renewal or policy therefor, the insurer is bound, although credit was given for the renewal premium. (*Squier v. Hanover Ins. Co.*, 349.)

12. **INSURANCE—FAILURE TO DISCLOSE LIENS ON PROPERTY.**—The failure to inform an insurance company, upon an oral application, of the existence of liens and encumbrances on the property, where no inquiries in reference thereto were made, does not render a policy void under a provision that it shall be void if the insured has concealed or misrepresented any material fact or condition, unless such failure was intentional and with the design to defraud. (*Arthur v. Palatine Ins. Co.*, 450.)

13. **INSURANCE—EXISTENCE OF CHATTEL MORTGAGE.** Where an insurance policy is issued upon an oral application, without any inquiry on the part of the company as to chattel mortgages upon the property, and without any statement by the assured in reference thereto, and where it does not appear that the assured knew that the company would refuse to take the risk if a mortgage existed, or that it would insert in the policy a clause making it void if such a mortgage existed, the company is deemed by its action to have consented to assume the risk of such mortgage, and to have waived the provision in the policy that it shall be void if the property is so encumbered. (*Arthur v. Palatine Ins. Co.*, 450.)

14. **INSURANCE—EVIDENCE OF DAMAGE.**—In an action upon an insurance policy, evidence tending to show the cost of putting a building in good condition immediately before the fire is inadmissible upon the question as to the damage caused by the fire. (*Home Fire Ins. Co. v. Kuhlman*, 111.)

15. **CORPORATIONS—CONTRACT TO EMPLOY FOR LIFE—VALIDITY.**—A contract to employ a physician for life made by the president and actuary of a life insurance company, under a by-law empowering them "to appoint, remove, and fix the compensation of each and every person except agents employed by the company," is unreasonable and not contemplated by the by-law, since the term of office of the trustees who adopted the by-law is limited by statute, and it must be assumed that they would not adopt a by-law which would interfere with the power of future boards of trustees by imposing on them unreasonable contracts. (*Carney v. New York Life Ins. Co.*, 347.)

See Arson.

INTEREST.

1. **MORTGAGES—INTEREST COUPONS—PENALTY.**—Where the interest to be paid for the use of a principal sum is definitely fixed by the terms of a note and mortgage, the installments of interest being evidenced by coupons, and an additional rate of interest on the entire debt is provided in case of default in the payment of the interest coupons, such additional interest is in the nature of a penalty, and will not be enforced. (*Connecticut etc. Ins. Co. v. Westerhoff*, 101.)

2. **INTEREST—AMOUNT INCLUDED IN DECREE.**—In Nebraska, when a contract provides for an interest rate of less than seven per cent per annum, a decree based upon such contract will bear interest at seven per cent. While a decree based upon a contract which provides for a legal rate of interest of more than seven per cent, will bear the rate of interest stipulated in the contract. (*Connecticut etc. Ins. Co. v. Westerhoff*, 101.)

See Negotiable Instruments, 13; Partnership, 2.

JOINT LIABILITY.

See Negligence, 6.

JUDGES.

1. JUDGES—ELIGIBILITY—"LEARNED IN THE LAW."—UNDER A CONSTITUTION which provides that no person shall be eligible to the office of judge of a county court unless he be "learned in the law," a person has no right to hold such office unless he was, at the time of his election, either admitted, or entitled to be admitted, without examination, to practice as an attorney at law in the courts of the state having such a constitution. (*Jamieson v. Wiggin*, 585.)

2. JUDGES—DISQUALIFICATION OF—INDIRECT INTEREST.—A judge is indirectly interested in an action where his wife is interested therein, and such interest absolutely disqualifies him from sitting in the case. Hence, the fact that she is a stockholder in a corporation disqualifies him from trying a cause in which it is a party plaintiff. (*First Nat. Bank v. McGuire*, 598.)

3. JUDGES—WAIVER OF DISQUALIFICATION—WHAT IS NOT.—A party does not waive his right to object to a judge's taking jurisdiction of a cause and proceeding with its trial by applying to him for an injunctive order relating to the same subject matter, where the judge is disqualified, because the acts of a disqualified judge are without jurisdiction. (*First Nat. Bank v. McGuire*, 598.)

JUDGMENT-ROLL.

See Appeal, 14.

JUDGMENTS.

1. JUDGMENT—EFFECT OF, ON VALIDITY OF DEED.—A judgment which declares that by a deed the grantees of the assignee of an insolvent debtor became the owners of certain property is conclusive, as against the contention that the deed was void for uncertainty in describing the property conveyed by it. (*Wadsworth v. Murray*, 265.)

2. JUDGMENTS AGAINST INFANTS—JURISDICTION.—If a judgment has been rendered against an infant in an action in which the court has acquired jurisdiction of the person of the infant by service of summons upon him personally, such judgment is merely voidable, and not void, even though no guardian ad litem shall have been appointed for such infant. (*Robertson v. Blair*, 543.)

3. JUDGMENTS AGAINST INFANTS—VOIDABLE REMEDY. The proper remedy to set aside a voidable judgment against a minor for failure to have him represented by guardian ad litem is by motion in the case. (*Robertson v. Blair*, 543.)

4. JUDGMENTS AGAINST INFANTS—AVOIDANCE.—Infants have, in general, no absolute right to avoid a judgment or decree against them, and even an irregular judgment cannot be vacated as of course. (*Robertson v. Blair*, 543.)

5. JUDGMENTS AGAINST INFANTS — AVOIDANCE — LACHES.—Although a judgment obtained against an infant, who did not appear by guardian, is irregular, yet the court is not bound, after the infant has attained his majority, to set aside such judgment upon the mere fact that he was an infant when it was obtained, but may consider lapse of time, the conduct of the infant, the ignorance of the plaintiff that he was a minor, and other circumstances as having confirmed the judgment, or rendered the interference of the court improper. (*Robertson v. Blair*, 543.)

6. JUDGMENT—OPENING DEFAULT—DISCRETION.—The vacation of a judgment by default, which was entered upon striking out a demurrer to the complaint for a technical defect, is a matter resting within the sound discretion of the court, and will not be disturbed upon appeal except for a manifest abuse of discretion. (*Schneider v. Hutchinson*, 474.)

7. A JUDGMENT CANNOT BE COLLATERALLY ATTACKED on the ground that the facts stated in the complaint do not constitute a cause of action. (*Altman v. School District*, 468.)

8. JUDGMENT—COLLATERAL ATTACK.—A judgment is not subject to collateral attack because it was entered within the time allowed by law for the defendant to plead. (*Altman v. School District*, 468.)

9. FOREIGN JUDGMENTS—ACTION ON—PLEADING—JURISDICTION—PRESUMPTION.—In an action of debt upon a judgment of a court of a sister state, it is not necessary to aver that such court had jurisdiction either of the subject matter or of the parties. The jurisdiction of such court is open to inquiry, but the question of jurisdiction cannot be raised by a general demurrer to the declaration, and it will be presumed that the court had jurisdiction until the contrary is shown by proof under a proper plea. (*Ferry v. Miltimore etc. Co.*, 787.)

10. JUDGMENTS—RES JUDICATA.—A judgment of a court of competent jurisdiction is binding between the parties to the action, regarding the subject matter thereof, either as a plea in bar or evidence in estoppel, not only as to every question actually presented and considered, and upon which the court rested its decision, but upon every point within the issues that might have been presented and decided in the case, and is likewise conclusive in any subsequent action between the same parties upon a different subject matter as to every question actually litigated and decided in the former action. (*Hart v. Moulton*, 881.)

11. JUDGMENTS—RES JUDICATA—PRIVIES.—A judgment, until reversed, is as binding on privies as on parties as to questions actually decided and upon which such judgment rests, whether it is rendered upon insufficient or false evidence, or erroneous notions of law. (*Hart v. Moulton*, 881.)

12. JUDGMENTS—RES JUDICATA—PRIVIES.—The doctrine of res judicata, although it binds privies of the parties to the litigation, as well as the parties themselves, recognizes privity as existing only in relation to the subject matter of the litigation. (*Hart v. Moulton*, 881.)

13. JUDGMENTS—RES JUDICATA.—The judgment in an action becomes a rule of property as to the subject matter thereof, and passes with it to all persons subsequently claiming under such parties, but does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, property right, subject matter, or thing involved in the litigation. (*Hart v. Moulton*, 881.)

See Appeal, 20; Executors and Administrators, 5; Husband and Wife, 5; Jurisdiction, 2; Limitation of Actions, 3, 4; Marriage and Divorce, 2-4; Mortgages, 3.

JUDICIAL SALES.

1. JUDICIAL SALES—WANT OF NOTICE.—A statute relating to judgments and executions and requiring written or printed notices of an execution sale to be posted, does not apply to a sale

in chancery, for the reason that chancery may provide for notice without complying with such conditions, provided the notice given is reasonable. (*Springer v. Law*, 57.)

2. JUDICIAL SALES—PURCHASERS—PRIOR LIENS.—THE RULE OF CAVEAT EMPTOR applies to judicial sales, and, in the absence of special circumstances, a purchaser cannot enjoin the enforcement of a prior lien on the property of which he was ignorant at the time he acquired his title. (*Hammond v. Chamberlain Banking House*, 106.)

3. JUDICIAL SALES.—A PURCHASER at a foreclosure sale cannot be released from his bid, although it was made under a mistake resulting from unwarranted overconfidence in representations of the officer making the sale. (*Hammond v. Chamberlain Banking House*, 106.)

4. JUDICIAL SALES—PRIOR LIENS—REMEDY OF PURCHASER.—The remedy of a purchaser at a judicial sale, who acquires knowledge of a prior lien on the property before the order of confirmation is entered, is to make application to the court to be released from his bid. (*Hammond v. Chamberlain Banking House*, 106.)

See Evidence, 1; Mortgages.

JURISDICTION.

1. JURISDICTION OF STATE COURTS.—No state can exercise jurisdiction and authority over persons or property without its territory. (*Lynde v. Lynde*, 332.)

2. JURISDICTION—ENFORCING FOREIGN DECREE.—The order of a foreign court seeking to carry into execution the final decree of such court by means of equitable remedies is not enforceable in another state. (*Lynde v. Lynde*, 332.)

See Attachment, 2; Habeas Corpus, 1, 2; Injunctions, 1-3; Judgments, 7; Limitation of Actions, 1; Marriage and Divorce, 5; Replevin.

JURY.

See Appeal, 16; Trial, 1-3.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—RELETTING PREMISES—ASSENT BY SILENCE.—The consent of a tenant who has abandoned premises to their reletting cannot be implied from a failure to answer a letter from his landlord, stating that he would relet on the tenant's account and hold him responsible for any loss that might be sustained, so as to prevent a surrender by operation of law if the landlord subsequently relets them. (*Gray v. Kaufman etc. Co.*, 327.)

2. LANDLORD AND TENANT.—A SURRENDER OF PREMISES is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made; such a surrender is created where the tenant abandons the premises and the landlord relets them in his own name. (*Gray v. Kaufman etc. Co.*, 327.)

LAW OF THE LAND.

See Constitutions, 3, 4.

LEASES.

See Landlord and Tenant; Trusts, 1.

LEGACIES.

See Wills, 9.

LIBEL.

1. **LIBEL—EXPRESS MALICE—EVIDENCE.**—In an action for libel against several defendants, proof of expressions of ill-will made by one of the defendants several years prior to the publication of the libel and unknown to the other defendants, and the author of such expressions being ignorant of the publication of the article until some time after, does not establish express malice against the defendants so as to authorize a recovery of punitive damages, since the proven statements have no connection with the wrong done, and a judgment recovered against all the defendants must be reversed. (*Krug v. Pitass*, 317.)

2. **LIBEL—EXPRESS MALICE** in an action for libel consists in publishing without justifiable cause and from ill-will, or some wrongful motive implying a willingness or intent to injure, that which is injurious to the character of another. (*Krug v. Pitass*, 317.)

3. **LIBEL—IMPLIED MALICE** in an action for libel consists in publishing, without justifiable cause, that which is injurious to the character of another. (*Krug v. Pitass*, 317.)

4. **LIBEL—PUNITIVE DAMAGES** in an action for libel are recoverable only upon proof of express malice or malice in fact, as distinguished from malice implied from the bare act of publication. (*Krug v. Pitass*, 317.)

5. **LIBEL—NEWSPAPER ARTICLE—ATTACKING PROFESSIONAL ABILITY.**—An article in a Polish newspaper, calling a physician a blockhead or fool, and appealing to the Poles of the community not to intrust themselves to his professional care, when he so hated them that he would not help them if he could, is libelous per se, because it charges a want of professional ability and integrity, and is actionable without proof of any damages. (*Krug v. Pitass*, 317.)

LIBERTY.

See Definitions.

LIENS.

See Corporations, 5, 6; Homesteads, 3; Insurance, 12; Judicial Sales, 2, 4; Mechanics' Liens; Vendor and Purchaser, 5, 6.

LIMITATION OF ACTIONS.

1. **STATUTES OF LIMITATION—JURISDICTIONAL DEFECTS.**—The principle that jurisdictional defects are so vital in their character as to be beyond the help of retrospective legislation does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right. (*Meigs v. Roberts*, 322.)

2. **LIMITATIONS OF ACTIONS—COTENANCY.**—The statute of limitations does not begin to run against a tenant in common or a remainder until the termination of the life estate, and if his co-

tenant owns the life estate, his possession cannot be adverse until the termination of such estate. (Clark v. Parsons, 157.)

3. LIMITATIONS OF ACTIONS—FOREIGN JUDGMENTS.—A STATUTE eliminating the time that a defendant is out of the state in computing the statutory period of limitation has no application in an action upon a foreign judgment, where the defendant was a nonresident of the state at the time the action accrued. (Van Santvoord v. Roethler, 472.)

4. JUDGMENTS, FOREIGN—STATUTE OF LIMITATIONS.—Where a cause of action upon a foreign judgment accrues against a nonresident, who subsequently becomes a resident, a state statute of limitations commences to run against such cause of action from the time it accrued in the other state, and the statute will bar such action, even though the judgment is still in full force in the state where it was rendered. (Van Santvoord v. Roethler, 472.)

5. LIMITATIONS OF ACTIONS—DEMAND NOTE—WHAT IS NOT.—A note given to a corporation, in payment for stock, is not a note payable on demand, where it is "payable in such installments and at such times as the directors may require, notice thereof being published agreeably to the charter," which requires thirty day's publication in a newspaper. The statute of limitations does not, therefore, begin to run on such a note from its date. (New England Fire Ins. Co. v. Haynes, 771.)

6. LIMITATIONS OF ACTIONS—DEMAND—REQUIREMENT AS TO TIME.—If it is apparent, from the terms of a note, that delay in making demand was expressly contemplated by the parties, there is no rule of law which requires that demand should be made within the statutory period for bringing an action. (New England Fire Ins. Co. v. Haynes, 771.)

7. LIMITATION OF ACTIONS AGAINST STATE AND CITIES.—The statute of limitations applies to municipal corporations and to the state in like manner as to individuals in similar cases, but it does not apply to the sovereign rights and property of the people of the state dedicated to the public use. (Ralston v. Weston, 834.)

See Adverse Possession; Mechanics' Liens, 7; Municipal Corporations, 15.

MALICE.

MALICE—IMPUTING TO ANOTHER.—Where more than one person is sued, the malice of one defendant cannot be imputed to another without connecting proof. (Krug v. Pitass, 317.)

See Libel, 14; Malicious Prosecution.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION OF CIVIL ACTION.—NO RECOVERY can be had by a defendant against a plaintiff for the malicious prosecution of a civil action where there has been no arrest of the person or seizure of property. (Cincinnati Daily Tribune Co. v. Bruck, 433.)

2. MALICIOUS PROSECUTION OF CIVIL ACTION—DAMAGES FOR, WHERE THERE IS NO SEIZURE OF PROPERTY. An incorporated newspaper company has no cause of action for the malicious prosecution of a suit against it by one of its stockholders, on a false averment of its insolvency, to the great injury of its credit and business, where there was no seizure of its property. (Cincinnati Daily Tribune Co. v. Bruck, 433.)

See Malice.

MANDAMUS.

1. **MANDAMUS.—CONTRACT RIGHTS** cannot be enforced by mandamus. (*Miller v. State Bd. of Agriculture*, 811.)

2. **MANDAMUS AGAINST STATE CONTRACTS.**—Under a constitutional provision prohibiting suits against the state, mandamus does not lie against state officers to compel them to execute an executory contract between an individual and the state, although the state in name is not made a party to the mandamus proceedings. (*Miller v. State Bd. of Agriculture*, 811.)

3. **MANDAMUS IS NOT A PROPER REMEDY** to enforce the performance of a duty which is not specifically enjoined by law, nor must the writ be issued in a case where there is a plain and adequate remedy in the ordinary course of the law. (*Fraternal Mystic Circle v. State*, 446.)

4. **MANDAMUS TO RESTORE TO MEMBERSHIP IN FRATERNAL SOCIETY.**—A writ of mandamus will not issue to compel a private corporation, such as the Fraternal Mystic Circle, organized for the mutual protection and relief of its members, to restore to membership therein a person who claims to have been illegally expelled therefrom and to be unlawfully excluded from participation in the advantages of membership in the corporation. Such restoration is not an act specially enjoined by law, and, assuming that the exclusion was wrongful, the member has a plain and adequate remedy in the ordinary course of the law. (*Fraternal Mystic Circle v. State*, 446.)

MANSLAUGHTER.

See Homicide, 3, 4.

MARRIAGE AND DIVORCE.

1. **MARRIAGE AND DIVORCE.—THE DEMAND FOR ALIMONY** in a divorce suit is not an essential part of the cause of action, but is merely incidental to the action and the judgment. (*Lynde v. Lynde*, 332.)

2. **STATUTES — DIVORCE — APPLICATION TO FOREIGN DECREES.**—The equitable remedies given by the New York Code of Civil Procedure for the enforcement of a direction for the payment of alimony in a judgment of divorce are applicable only to judgments rendered in New York. (*Lynde v. Lynde*, 332.)

3. **CONSTITUTIONAL LAW—ENFORCING FOREIGN DECREE FOR FUTURE ALIMONY—FULL FAITH AND CREDIT.**—The provision of the federal constitution which requires that full faith and credit shall be given to the judicial proceedings of another states relates to judgments or decrees which are both conclusive in the jurisdiction where rendered and final in their nature; hence a foreign decree for the future payment of alimony, which remains subject to the discretion of the foreign court, lacks that conclusiveness of character requisite for its enforcement by the courts of another state. (*Lynde v. Lynde*, 332.)

4. **CONSTITUTIONAL LAW — ENFORCEMENT OF FOREIGN DECREE FOR ALIMONY.**—A final decree of the court of another state, rendered with jurisdiction over the person of the defendant, that the defendant pay a definite sum of money as alimony, establishes a debt of record against him which has extra-territorial value and force, and the courts of another state should give it full credit and effect. (*Lynde v. Lynde*, 332.)

5. MARRIAGE AND DIVORCE—ALIMONY AGAINST NON-RESIDENT DEFENDANT—JURISDICTION BY GENERAL APPEARANCE.—Where an original divorce decree, rendered by a court in another state and void as against a nonresident defendant because rendered without jurisdiction, is properly amended so as to include a judgment for alimony, and the defendant appears generally in the proceedings to amend the decree after notice of such proceedings have been served on him, jurisdiction is obtained over such defendant to render a final decree against him for the payment of alimony. (*Lynde v. Lynde*, 332.)

MASTER AND SERVANT.

1. MASTER AND SERVANT—CARE REQUIRED OF MASTER.—A master is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of that work, and free from latent or concealed dangers. (*Saunders v. Eastern etc. Brick Co.*, 222.)

2. MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—A master is not required to furnish a mullion of a window in a flat roof strong enough to bear the weight, or any part of the weight, of a servant directed to go upon the roof and replace a pane of glass in the window, as the liability of such mullion to break under the pressure required to remove the old putty is as apparent to the servant as to the master, and constitutes an obvious danger, the risk from which is assumed by the servant. (*Saunders v. Eastern etc. Brick Co.*, 222.)

3. MASTER AND SERVANT—LOAN OF SERVANT.—If one person lends his servant to another for a particular employment, the servant, while thus engaged, is the servant of the latter. (*Gagnon v. Dana*, 170.)

4. MASTER AND SERVANT—PAYMENT IN ORDERS INSTEAD OF CASH.—A STATUTE requiring employers to redeem in cash any coupons, scrip, punchouts, store orders, or other evidences of indebtedness which they have issued in payment of wages, provided such orders are presented at a regular pay-day or not less than thirty days after issuance, applies to all employers using this method of paying their employes, whether such use is habitual and arbitrary, or only occasional and without constraint. (*Harbison v. Knoxville Iron Co.*, 682.)

5. INDEPENDENT CONTRACTORS—LIABILITY FOR ACTS OF.—One under a duty to the public, or to a third person, to see that work he is about to do, or to have done, is carefully performed so as to avoid injury to others, cannot absolve himself from liability by the employment of an independent contractor. (*Covington etc. Bridge Co. v. Steinbrock*, 375.)

6. INDEPENDENT CONTRACTORS—LIABILITY FOR ACTS OF—TAKING DOWN A WALL.—If a warehouse is, in a measure, destroyed by fire, so that one of the walls is left standing in such a ruined condition as to be a menace to the public and to the property of persons in the vicinity, and its owner is required to take the wall down, he is answerable where he employs an independent contractor to raze the wall, and where the wall, owing to the negligence of the contractor in taking it down, falls outward upon, and injures, the property of third persons near by, notwithstanding a stipulation in the contract that the contractor shall save the employer harmless for injury to others in doing the work. (*Covington etc. Bridge Co. v. Steinbrock*, 375.)

See Police Power, 2; Statutes, 3, 23.

MECHANICS' LIENS.

1. **MECHANIC'S LIEN LAWS** are liberally construed so far as the property to which the lien attaches is concerned. (*Nanz v. Park Co.*, 650.)

2. **MECHANIC'S LIEN—WHO ENTITLED TO.**—A STATUTE giving a lien upon land upon which "a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected or improvements made," by special contract, refers to things constructed upon the land, such as buildings, machinery, fixtures, and structures, and not to the enriching of the soil and beautifying the grounds by planting flowers, shrubs, and trees, and by grading and graveling the grounds and walks. (*Nanz v. Park Co.*, 650.)

3. **MECHANICS' LIENS.**—A PERSON WHO FURNISHES BOARD TO WORKMEN employed in making brick under a contract with their employer does not perform labor nor furnish materials for making the brick, entitling him to a mechanic's lien. (*Perrault v. Shaw*, 160.)

4. **MECHANIC'S LIEN — PURCHASER AT DISCOUNT — RIGHT TO ENFORCE.**—One who purchases a mechanic's lien at a discount is entitled to enforce it for its full face value as against other lienholders toward whom he stands in no fiduciary relation. (*Title Guarantee Co. v. Wrenn*, 454.)

5. **MECHANIC'S LIEN—CONSTITUTIONAL LAW—CONSENT OF OWNER.**—A statute providing that every building or other improvement constructed upon land with the knowledge of the owner shall be held to have been constructed at the owner's instance, whose interest shall be subject to a lien, is not unconstitutional as creating a lien upon the land of another without his consent, since the statute simply provides a rule of evidence by which such consent can be determined. (*Title Guarantee Co. v. Wrenn*, 454.)

6. **MECHANIC'S LIEN—MEANING OF "OWNER."**—Under a statute providing for a lien upon land upon which a building has been constructed "with the knowledge of the owner," the word "owner" refers to the owner of the legal title to the land, and not to the owner of the building. (*Title Guarantee Co. v. Wrenn*, 454.)

7. **MECHANIC'S LIEN—STATUTE OF LIMITATIONS—EFFECT OF FILING ANSWER.**—Under a statute which provides that a suit to enforce a mechanic's lien must be begun within six months, and that in such a suit all other lienholders shall be made parties, the filing of an answer by a defendant in such a proceeding is as effectual to prevent the bar of the statute of limitations as the beginning of an original suit. (*Title Guarantee Co. v. Wrenn*, 454.)

8. **MECHANIC'S LIEN—PLEADING—AVERMENT OF OWNERSHIP.**—In a suit to foreclose a mechanic's lien, an answer which sets up a further lien, but does not clearly state the name of the owner or the reputed owner of the building, is sufficient after decree, where the lien notices, which name every person who seems to have had or claimed any interest in the property, or who was an owner or reputed owner, are attached to and made a part of the answer. (*Title Guarantee Co. v. Wrenn*, 454.)

9. **MECHANIC'S LIEN — ATTORNEY'S FEE — CONSTITUTIONAL LAW.**—A statute providing for a reasonable attorney's fee in a suit to foreclose a mechanic's lien is not unconstitutional as granting unequal privileges to litigants and denying equal protection of the laws, since such a provision is in the nature of costs to be determined by the court. (*Title Guarantee Co. v. Wrenn*, 454.)

10. **MECHANIC'S LIEN—EFFECT OF INCLUDING NONLIEN-ABLE ITEMS.**—Where the demand of a lien claimant, made in good

faith, consists of different items, separately charged, some of which are by law a lien upon the property and others not, he may enforce his lien so far as given by law, and it is not vitiated because by mistake he has included therein nonlienable items. (Title Guarantee Co. v. Wrenn, 454.)

MERGER.

1. **MERGER OF ESTATES.**—Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property is generally a question of the owner's intention; he may elect to keep them separate. (Longfellow v. Barnard, 117.)

2. **MERGER OF LEGAL AND EQUITABLE ESTATES.—A CONVEYANCE OF THE EQUITY OF REDEMPTION** to a mortgagee does not, as a general rule, constitute a merger of the legal and equitable estates, when, from all the circumstances, it is apparent that the best interests of the mortgagee require the two estates to be kept separate, unless it is found that such was the intention of the mortgagee. The intention of the mortgagee governs, and when his intention to merge the two estates is established, it controls. (Howard v. Clark, 782.)

3. **MERGER OF LEGAL AND EQUITABLE ESTATES—FRAUD—DEED OF EQUITY OF REDEMPTION.**—There is no merger of legal and equitable estates where the mortgagee takes a deed of the equity of redemption from the mortgagor, notwithstanding the intention of the mortgagee that it shall be in payment and discharge of the mortgage debt, if the mortgagee is fraudulently led by the mortgagor to believe that the premises are free of encumbrance, and accepts the deed under a mistaken belief that the premises are not encumbered. (Howard v. Clark, 782.)

4. **REAL PROPERTY—MERGER OF ENCUMBRANCE IN THE FEE.**—Where the legal ownership of land and the absolute ownership of an encumbrance upon it become vested in the same person, the intention governs the question of merger; and if the owner has an interest in keeping such interests distinct, there will be no merger unless he expressly wishes it. (Title Guarantee Co. v. Wrenn, 454.)

5. **ESTATES—MERGER.**—A life estate merges in the remainder only to the extent of the interest of the life tenant in such remainder. (Clark v. Parsons, 157.)

MINES AND MINING.

1. **MINES AND MINING—WILLFUL OMISSION OF STATUTORY DUTY.**—A mine owner is charged with knowledge of the provisions of the statute relating to the safety of miners, and his intentional and conscious omission of a statutory duty is a "willful" omission within the meaning of that word as used in the statute. (Odin Coal Co. v. Denman, 45.)

2. **MINES AND MINING—WILLFUL OMISSION OF STATUTORY DUTY—EVIDENCE.**—In an action to recover from a mine owner for his "willful omission" of a statutory duty, evidence of his intention to comply with the statute is inadmissible if the charge in the complaint does not involve evil or wrongful intent, but only conscious acts of omission, and not mere inadvertence. (Odin Coal Co. v. Denman, 45.)

See Negligence, 7, &

MISTAKE.

See Cloud on Title.

MORTGAGES.

1. **MORTGAGES — ACTION AGAINST TRESPASSER.** — An owner of mortgaged lands may maintain an action against a trespasser, and is entitled to recover for the entire damage done to the premises, but such recovery is a bar to a subsequent suit by the mortgagee to recover for the same trespass. (*Elvins v. Delaware etc. Tel. Co.*, 217.)

2. **MORTGAGES—ACTION AGAINST TRESPASSER.**—A mortgagee of lands may first maintain an action against a trespasser thereon, and is entitled to recover such sum as will compensate him for the injury done to the mortgage as a security, and in a subsequent suit against the trespasser by the mortgagor the former may give in evidence the recovery by the mortgagee in mitigation of damages. (*Elvins v. Delaware etc. Tel. Co.*, 217.)

3. **MORTGAGES — FORECLOSURE — DEFICIENCY — DECREE.**—A personal deficiency decree may be rendered conditionally at the time that the decree of foreclosure is rendered, or absolutely after sale and ascertainment of the balance due. (*Springer v. Law*, 57.)

4. **JUDICIAL SALES.—WANT OF NOTICE** to the mortgagor of a foreclosure sale, and the fact that the property was sold for an inadequate price, are not grounds for setting aside the sale and confirmation thereof made in chancery, for the reason that the mortgagor's right of redemption gives him the same benefit as if he had been present at the sale and bid in the property at full value. (*Springer v. Law*, 57.)

5. **JUDICIAL SALES.—PUBLISHED NOTICE** of a foreclosure sale made in chancery is sufficient if it gives the title of the cause and the date of the decree, and states that the sale is made in pursuance of such decree showing the amount due. (*Springer v. Law*, 57.)

6. **MORTGAGES — RENEWAL — PRIORITY.**—A renewal note and mortgage made before the filing of intervening mechanics' liens and in ignorance of their existence occupies the same place, so far as priority is concerned, as the original note and mortgage. (*Title Guarantee Co. v. Wrenn*, 454.)

7. **MORTGAGES—ACCELERATED MATURITY—FORECLOSURE.**—The provisions in a note and mortgage that, for any default in the payment of the installments of principal or interest, the entire indebtedness shall become due and collectible at once, is not a forfeiture, and will be enforced as the proper contract of the parties. (*Connecticut etc. Ins. Co. v. Westerhoff*, 101.)

8. **MORTGAGES—FRAUDULENT—ASSIGNMENT TO BONA FIDE CREDITOR.**—Where a mortgage given to defraud creditors is assigned by the mortgagee, who is also the vendee of the property, as security to a bona fide creditor of the mortgagor, such transaction is, in substance, a restoration of the property to the owner, and the execution by him of a mortgage thereon to secure the just claim of a creditor. The original mortgage is thereby purged of the fraud with which it was originally tainted, and becomes a valid and enforceable security. (*Longfellow v. Barnard*, 117.)

9. **MORTGAGES — FRAUDULENT—ASSIGNMENT—CONSIDERATION.**—The assignment of a fraudulent mortgage by the mortgagee to a just creditor of the mortgagor does not require a consid-

eration moving from the assignee to the assignor to support it. (*Longfellow v. Barnard*, 117.)

10. **MORTGAGES — CONSIDERATION. — A PRE-EXISTING DEBT**, already due, is a sufficient consideration for the execution of a mortgage securing the same. (*Longfellow v. Barnard*, 117.)

11. **MORTGAGES—INDEMNITY—CONSIDERATION.**—The liability of a principal debtor to his surety or guarantor is a valuable consideration for the execution to him of an indemnity mortgage. (*Longfellow v. Barnard*, 117.)

12. **EQUITY — EQUALITY — MORTGAGEE AND MORTGAGOR.**—In restoring one to his rights as senior mortgagee, equality is equity, and the mortgagor must, therefore, be restored, so far as possible, to his rights as mortgagor, with the privilege of redeeming. (*Howard v. Clark*, 782.)

13. **MORTGAGES—REINSTATEMENT AS SENIOR MORTGAGEE—OBJECTIONS.**—A subsequent mortgagee, who had both constructive and actual notice of the prior encumbrance when he took his own, cannot object to one's being restored to his rights as senior mortgagee, because he suffers no injustice thereby. (*Howard v. Clark*, 782.)

14. **NOTICE AS TO ENCUMBRANCES—EXAMINING RECORD—DUTY—NEGLIGENCE.**—A record of a subsequent mortgage is not constructive notice to a prior mortgagee; and, as no duty rests upon a prior mortgagee to examine the records for subsequent encumbrances, he is not guilty of negligence in failing so to do. (*Howard v. Clark*, 782.)

See Chattel Mortgages; Duress; Homesteads, 2; Insurance, 12, 13; Interest, 1; Judicial Sales; Merger, 4; Trusts, 1, 3.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—ORDINANCE REGULATING VEHICLES.**—A municipal ordinance providing that any person owning or using any street carriage, hack, or other vehicle for the purpose of conveying passengers, goods, or merchandise from one part of the city to the other for hire, or who shall stop, stand, or detain any such vehicle on certain streets, or in front of any public hotel in such city, except when actually engaged in receiving or delivering passengers, goods, or merchandise, shall be guilty of a misdemeanor, is unreasonable, and hence void. (*Ex parte Battis*, 708.)

2. **MUNICIPAL CORPORATIONS HAVE POWER BY ORDINANCE** to prevent the encumbering or obstructing of their streets, alleys, and highways by vehicles, and to that end can regulate their use, fix stands for vehicles, and permit them to use no other place as stands, but such power must be exercised in a reasonable and uniform manner. (*Ex parte Battis*, 708.)

3. **MUNICIPAL CORPORATIONS — ASSESSMENT FOR STREET IMPROVEMENT EXCEEDING BENEFITS CONFERRED.**—An assessment made by a city for the improvement of a street, being sustainable only on the theory of special benefits conferred on the land assessed by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. (*Walsh v. Barron*, 354.)

4. **MUNICIPAL CORPORATIONS. — ASSESSMENT FOR STREET IMPROVEMENT IN EXCESS** of the value of the property with the benefits added by the improvement amounts to a

taking of private property for public use without compensation, and hence cannot be enforced. (*Walsh v. Barron*, 354.)

5. MUNICIPAL CORPORATIONS — ASSESSMENT FOR STREET IMPROVEMENT—LIMITATION UPON.—An assessment for the improvement of a street must be restricted to the special benefits conferred upon the property assessed, as distinguished from those common to the public, although a limitation of the general law of the state, confining assessments to twenty-five per cent of the value of the property as returned for taxation, has been removed by an amendment to such statute. (*Walsh v. Barron*, 354.)

6. MUNICIPAL CORPORATIONS — FURNISHING WATER SYSTEM.—Under a charter authorizing a city to issue bonds for the purpose of furnishing itself with a water system, the municipality acts within its powers by entering into a contract, executory in its nature, looking to the future acquirement of a water system, even though by such contract it does not become the present absolute owner of such system. (*Klamath Falls v. Sachs*, 501.)

7. MUNICIPAL CORPORATIONS—CHARTER—WATER AND LIGHTING SYSTEM.—Where a municipal charter provides that a city may issue bonds "for the purpose of lighting the town and furnishing it with a water system," the city is not required both to provide for lighting the town and at the same time to furnish it with a water system, but it may, in its discretion, provide for either system or for both. (*Klamath Falls v. Sachs*, 501.)

8. MUNICIPAL CORPORATIONS — INDEBTEDNESS — PURCHASING WATER SYSTEM.—Under a charter which limits the debt of a municipal corporation to a certain sum, but which authorizes the incurring of an additional indebtedness of a stated amount by issuing bonds for the purpose of furnishing a water system, the amount of the bonds is not a limitation upon the cost of the water system. (*Klamath Falls v. Sachs*, 501.)

9. MUNICIPAL ORDINANCE — BONDS, WHETHER A BONUS.—A municipal ordinance granting a franchise for the construction of waterworks, providing that upon its completion the city shall deliver to the owner bonds for a certain sum, the franchise to extend for a stated period, at the end of which the city shall have the option of purchasing the waterworks, the bonds to be considered a first payment upon the purchase price, and that in the meantime the city shall have an interest in the waterworks to the extent of the amount of the bonds delivered to the owner, is not invalid as providing for the delivery of the bonds as a bonus. (*Klamath Falls v. Sachs*, 501.)

10. MUNICIPAL CORPORATIONS—BONDS—ISSUANCE BY TRUSTEES.—Where a town is authorized by its charter to issue bonds for a certain purpose, its board of trustees may issue such bonds without submitting the question to a vote of the people, since the trustees are agents of the town in the exercise of all powers accorded it by the legislature, and the town acts through them in the transaction of all public business. (*Klamath Falls v. Sachs*, 501.)

11. MUNICIPAL CORPORATIONS—POWER TO ISSUE NEGOTIABLE BONDS.—The power to "issue bonds" for a specified purpose, given to a municipal corporation by its charter, includes the power to make such bonds negotiable, especially where the charter limits the amount of indebtedness which the municipality may contract, and provides that every warrant showing obligations in excess of such limit should be so indicated on its face. (*Klamath Falls v. Sachs*, 501.)

12. MUNICIPAL CORPORATIONS—ESTOPPEL TO DENY VALIDITY OF BONDS.—A statement on the face of municipal bonds that they were issued by virtue of a certain ordinance, giving its date and full title, is such a reference thereto as to put persons dealing in them upon inquiry touching the provisions and purpose of the ordinance, and whether it was such a one as had the sanction of the charter in its enactment; and a further recital that the bonds were issued in pursuance of the charter does not estop the municipality from denying their validity, since such recital covers a matter of law only. But a recital in such bonds respecting the existence of specified facts, and the performance of the requisite conditions which are within the province of municipal officers to ascertain and determine, will estop the municipality to assert or maintain anything to the contrary as against the claim of innocent holders. (*Klamath Falls v. Sachs*, 501.)

13. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—EVIDENCE.—If, in an action against a city to recover for injury caused by a defective sidewalk, the city admits notice of the actual condition of the walk, evidence so remote as not to bear on the question as to whether it was defective at the time of the accident is not admissible. (*Selleck v. Janesville*, 892.)

14. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—EVIDENCE.—If, in an action against a city to recover for injury for defects in a sidewalk, the city has admitted notice of the condition of the sidewalk, evidence of complaints to the city authorities as to the condition of such walk and of the introduction of an ordinance requiring the walk to be repaired is inadmissible on the issue as to the existence of defects in the walk. (*Selleck v. Janesville*, 892.)

15. MUNICIPAL CORPORATIONS — STREETS — LACHES — LIMITATIONS.—A city has no alienable interest in the public streets or alleys thereof, and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. (*Ralston v. Weston*, 834.)

See Dedication; Injunctions, 7; Limitation of Actions, 7.

NEGLIGENCE.

1. NEGLIGENCE CAUSING DEATH—ACTION FOR.—The right of action given by the statute providing that if the death of a person is caused by the negligence of another the latter may be held liable in an action brought by and in the name of the personal representatives of the deceased, and that the amount recovered shall belong to his lineal descendants, constitutes no part of the estate of the deceased and is not taken away by the final settlement of such estate, or the failure or refusal of the administrator to commence suit before such final settlement. (*Hubbard v. Chicago etc. Ry. Co.*, 855.)

2. NEGLIGENCE—INFANT TRESPASSERS.—An owner of dangerous machinery in operation in the usual course of business is under no obligation to protect an infant trespasser from injury therefrom, although such infant is incapable of appreciating the danger, or of exercising the care necessary to avoid it. (*Buch v. Amory Mfg. Co.*, 163.)

3. **NEGLIGENCE—TRESPASSERS.**—An owner of premises is not bound to warn a trespasser, whether adult or infant, of hidden or secret dangers arising from the condition of such premises, or to protect him against any injury that may arise from his own acts or the acts of others. (*Buch v. Amory Mfg. Co.*, 163.)

4. **NEGLIGENCE—DEFECTIVE FENCE—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.**—A railroad company neglecting to keep a barbed wire fence in repair, as required by statute, is liable to the owner of adjoining lands for injury, caused by such defective fence, to his horses which he had turned out into the highway to graze, and the plaintiff is not guilty of contributory negligence, although at the time he turned his horses loose he knew the character and condition of the defendant's fence. (*Siglin v. Coos Bay Co.*, 463.)

5. **NEGLIGENCE—DANGEROUS WORK—DUTY AND LIABILITY.**—A person who has a piece of work, the performance of which is dangerous to others, is under an obligation to see that it is carefully performed, which he cannot delegate to another so as to avoid liability in case of injury. (*Covington etc. Bridge Co. v. Steinbrock*, 375.)

6. **JOINT LIABILITY—NEGLIGENCE.**—In an action for personal injuries, where two defendants are jointly charged with negligence, one of them, who is shown to have been negligent, cannot escape liability by proving that the other defendant was also negligent. (*Ohio etc. Torpedo Co. v. Fishburn*, 437.)

7. **MINES AND MINING—NEGLIGENCE.**—In an action to recover for the death of an employé caused by a mine owner's willful omission to furnish sufficient lights at the top of the shaft as required by statute, the contributory negligence of the deceased cannot be invoked as a defense. (*Odin Coal Co. v. Denman*, 45.)

8. **MINES AND MINING—NEGLIGENCE—PROXIMATE CAUSE.**—In an action by an employé to recover from a mine owner for injury caused by his "willful omission" of a statutory duty, not only must such willful omission be shown, but it must also be proved that was the proximate cause of the accident. (*Odin Coal Co. v. Denman*, 45.)

9. **NEGLIGENCE—PLEADING PROXIMATE CAUSE.**—It is not necessary to aver in terms that the wrongs of the defendant were the natural and proximate cause of the plaintiff's injury. It is sufficient if it substantially appears that the defendant's wrongful acts were the cause of the plaintiff's injury. (*Garland v. Aurin*, C99.)

See Damages, 3; Gas Companies, 1, 2; Insurance, 3; Mortgages, 14; Mines and Mining; Railroads, 9, 10.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.**—A guardian is a bona fide holder of an unmatured note and mortgage taken from a former joint guardian to pay an indebtedness to the ward for property which such former guardian has had and failed to account for at the time of resigning as guardian. (*Mack v. Prang*, 848.)

2. **NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.**—A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder. (*Mack v. Prang*, 848.)

3. **NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—ACCOMMODATION PAPER.**—Where the payee of a

promissory note transfers it for value, the purchaser has a right to assume that the relation of every party whose name had been written upon it was precisely what it appeared to be, and the fact that the names of other subsequent indorsers appear upon the note does not charge the purchaser with notice that it was executed by the maker for the payee's accommodation. (Second Nat. Bank v. Weston, 283.)

4. NEGOTIABLE INSTRUMENTS—NOTICE THAT NOTE IS ACCOMMODATION PAPER—QUESTION FOR JURY.—Evidence that the payee told the purchaser of a note that it was given him "to use in his matters," coupled with the statement that it was given on account of property transferred to the makers, does not conclusively establish notice to the purchaser that it was an accommodation note. The question as to what inference should be drawn from such evidence is for the jury. (Second Nat. Bank v. Weston, 283.)

5. NEGOTIABLE INSTRUMENTS—DUTY OF PURCHASER. The purchaser of negotiable paper, for value and before maturity, is not bound at his peril to be on the watch for facts which might put a cautious man on his guard. (Second Nat. Bank v. Weston, 283.)

6. NEGOTIABLE INSTRUMENTS—DURESS AS DEFENSE.—The defense of duress to negotiable paper is cut off by its transfer to a bona fide purchaser before maturity. (Mack v. Prang, 848.)

7. NEGOTIABLE INSTRUMENTS — DISCOUNT — UNCERTAINTY AS TO AMOUNT—NON-NEGOTIABILITY.—A promissory note having a statement written upon its face that it is to be discounted at a certain per cent if paid before maturity is non-negotiable, for, at the time of its execution, it is impossible to ascertain what amount will be required to pay it, without considering the discount depending upon a condition uncertain of fulfillment. (National Bank of Commerce v. Feeney, 594.)

8. NEGOTIABLE INSTRUMENTS—STATEMENT ON MARGIN.—THE PRESUMPTION is, that a statement upon the margin of a note that it is to be discounted at a certain per cent if paid before maturity was written upon the face of the instrument contemporaneously with its execution, and as a constituent part thereof. It must, therefore, be given effect as such. (National Bank of Commerce v. Feeney, 594.)

9. NEGOTIABLE INSTRUMENTS—UNCERTAINTY AS TO AMOUNT RENDERS NOTE NON-NEGOTIABLE.—A promissory note is non-negotiable unless the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment. (National Bank of Commerce v. Feeney, 594.)

10. NEGOTIABLE INSTRUMENTS—WHEN NON-NEGOTIABLE NOTE IS SUBJECT TO EQUITIES—SETOFF.—If sheep, purchased on a warranty, are paid for by a non-negotiable note, the maker of which is sued thereon by a bona fide purchaser thereof before maturity, the defendant is entitled to set off damages caused by a breach of the warranty not to exceed the amount of the note. (National Bank of Commerce v. Feeney, 594.)

11. NEGOTIABLE INSTRUMENTS — INDORSER'S AGREEMENT—EVIDENCE.—Parol evidence is admissible to show that indorsers of a note in blank agreed that the liability should be that of cosureties, and not of successive sureties. (Sloan v. Gibbes, 559.)

12. NEGOTIABLE INSTRUMENTS—INDORSERS—PAYMENT. If a bank accepts in payment of a note the individual note of an

indorser secured by mortgage, the latter occupies the position of one who has paid the note. (*Sloan v. Gibbes*, 559.)

13. **NEGOTIABLE INSTRUMENTS—CONTRIBUTION BY INDORSER—INTEREST.**—In an action by one indorser of a note for contribution by another as cosurety under a special parol agreement, only the legal rate of interest can be recovered, although the suing indorser has paid a higher rate. (*Sloan v. Gibbes*, 559.)

14. **NEGOTIABLE INSTRUMENTS.—PROTEST** of note may be verbally waived. (*Sloan v. Gibbes*, 559.)

15. **NEGOTIABLE INSTRUMENTS—WANT OF PROTEST AS DEFENSE.**—Failure to protest a note is no defense available to an indorser in an action on a special agreement for contribution as a cosurety. (*Sloan v. Gibbes*, 559.)

See Checks; Executors and Administrators, 8; Gaming, 2; Limitation of Actions, 5, 6; Municipal Corporations, 11.

NEW TRIAL.

See Appeal, 25.

NONSUIT.

See Trial, 4.

NOTICE.

1. **NOTICE.—ACTUAL NOTICE** supplies the place of recording. (*McGhee v. Wells*, 567.)

2. **NOTICE—PUBLIC OFFICE.**—An act done in public office, open for the information of parties interested, must be taken notice of by them. (*Robertson v. Blair*, 543.)

See Appeal, 13; Attachment, 12; Depositions; Gas Companies, 1; Judicial Sales, 1; Mortgages, 2, 3, 14; Statutes, 21.

NUISANCE.

NUISANCE—DAMAGES.—If a private nuisance is of such character that its continuance is necessarily an injury, and it is of a permanent character, that will continue without change from any cause but human labor, and dependent for change on no contingency of which the law can take notice, then the damages are original, and a right of action at once exists to recover the entire damage, past and future, and one recovery bars a second recovery for the continuance of the nuisance. Otherwise, when the damage is not continuous, but intermittent, occasional, or recurring. (*Guinn v. Ohio River R. R. Co.*, 806.)

See Highways.

OFFICERS.

1. **OFFICE AND OFFICERS—VACANT OFFICE—CONSTRUCTION OF STATUTE.**—Mere words in a statute to the effect that an officer by accepting another office makes the first office vacant, cannot alone make an office vacant or unoccupied which is in fact occupied. The legal meaning of such words under such circumstances is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or if it be an elective office, the people may elect, and no ad-

judication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary to resort to quo warranto proceedings to obtain actual possession of the office. (*Oliver v. Jersey City*, 228.)

2. OFFICE AND OFFICERS—OFFICER DE FACTO.—A person who is legally elected to, and qualifies and enters upon the duties of an office, and subsequently is appointed to and accepts another and incompatible office, but continues to publicly discharge the duties of the first during the term thereof, without any attack made upon his title, or the appointment or election of any other person thereto, is a de facto officer. (*Oliver v. Jersey City*, 228.)

3. OFFICE AND OFFICERS—DE FACTO OFFICER.—A person exercising the functions of a valid public office by color of right must be deemed to be an officer de facto, and his acts protect third persons, although he has legally forfeited his office by accepting an incompatible one. (*Oliver v. Jersey City*, 228.)

4. OFFICE AND OFFICERS—OFFICER DE FACTO.—The official acts of an officer de facto are valid as to third persons, unless the defects in his title are so notorious as to make those relying on his acts chargeable with knowledge. When they see a person occupying a public office by virtue of a public election, and publicly exercising its duties, they are entitled to consider him to be such officer, and to protection as to his acts. (*Oliver v. Jersey City*, 228.)

5. OFFICE AND OFFICERS.—ACTS OF DE FACTO OFFICERS holding under color of title originally lawful, when acting in good faith, afford protection to third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body. (*Oliver v. Jersey City*, 228.)

6. ACTIONS—VALIDITY OF ACT DONE BY OFFICER—PARTIES.—If an action is instituted, the object of which is only to determine the validity of an act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer is not a necessary party. (*Oliver v. Jersey City*, 228.)

7. BONDS—LIABILITY OF SURETIES.—The law in force at the time of the execution of an official bond, giving it a certain legal effect, is part of the bond, and the sureties must be held to have known such law and to have engaged with reference thereto. (*State v. McGuire*, 822.)

8. BONDS—DEFECTS IN.—If an official bond contains some valid provisions and others which are invalid, the latter, if separable, may be ignored, and the bond held valid. (*State v. McGuire*, 822.)

9. OFFICIAL BONDS—DEFECT, WHEN IGNORED.—If the official bond of a sheriff provides for the faithful discharge of his duties, and that "he shall account for and pay over all money that shall come to his hands for school purposes for the year 1893," the phrase "for the year 1893" may be ignored and the bond be held to cover all school money received by him during any year in his term of office. (*State v. McGuire*, 822.)

10. BONDS—DEFECTS IN, WHEN IGNORED.—If the statute states that an official bond not taken conformably to it shall be void, a bond departing from it is void; but, where the statute merely prescribes a condition, and does not declare a bond not conforming to it void, a clause not warranted by the statute, or contrary to it, is alone void, and may be eliminated and ignored, while the remainder of the bond may be held valid. (*State v. McGuire*, 822.)

11. **BONDS—PLEADING.**—If, in an action on an official bond, the only plea is a plea of payment, it is not necessary to produce the bond. (*State v. McGuire*, 822.)

See Attachment, 7; Notice, 2.

OPINION EVIDENCE.

See Witnesses, 7-10.

OSTEOPATHY.

See Physicians.

PARENT AND CHILD.

1. **PARENT AND CHILD—CONTRACT FOR SUPPORT.**—A father's promise to pay his son for keeping him creates a valid debt. (*Harris v. Orr*, 815.)

2. **PARENT AND CHILD—RIGHT TO EARNINGS—EMANCIPATION.**—Where a parent has in good faith emancipated his minor child, and relinquished all right to his earnings, his creditors cannot reach earnings thereafter acquired by such minor to apply them in payment of the parent's debts. (*Flynn v. Baisley*, 495.)

3. **PARENT AND CHILD—EMANCIPATION—EVIDENCE.**—A writing is unnecessary to establish the emancipation of an infant, but it may be implied from the circumstances. (*Flynn v. Baisley*, 495.)

See Fraudulent Conveyances, 3; Gifts, 1.

PARTIES.

See Fraudulent Conveyances, 6; Officers, 7.

PARTITION.

PARTITION—ESTATE IN REMAINDER.—Partition cannot be enforced where there is no joint possession to be divided and the plaintiff has the sole right of possession of the entire premises. Hence, an owner in fee of an undivided seventh of real estate and of a life estate in the other six-sevenths cannot maintain an action for partition against those who own the remaining six-sevenths in remainder, subject to such life estate. (*Pabst Brewing Co. v. Melms*, 921.)

PARTNERSHIP.

1. **PARTNERSHIP—AUTHORITY OF ONE MEMBER TO SIGN ACCOMMODATION PAPER—QUESTION FOR JURY.**—Where one partner uses the firm name constantly for years in signing accommodation paper, and his copartners simply remonstrate privately with him, there is evidence of acquiescence and ratification, and it is a question of fact for the jury as to the good faith of the copartners, and as to the implied authority of the other partner. (*Second Nat. Bank v. Weston*, 283.)

2. **PARTNERSHIP—RIGHT OF PARTNER TO INTEREST ON ADVANCES.**—A partner may loan money to the firm of which he is a member and receive interest therefor, and in such cases interest is allowed on the advances even in the absence of an express agreement by the firm to pay it if there is no agreement to the contrary, express or implied. (*Rodgers v. Clement*, 342.)

3. PARTNERSHIP—CONTINUANCE OF, AS TO THIRD PARTIES.—A partnership, with the authority of one member to bind his copartners, continues as to third persons, acting in good faith, who knew of the existence of the firm, but had no knowledge, actual or constructive, of its dissolution. (Second Nat. Bank v. Weston, 283.)

See Attachment, 10.

PHOTOGRAPHS.

See Evidence, 2, 3.

PHYSICIANS.

PHYSICIANS AND SURGEONS—PRESCRIBING OSTEOPATHY IS NOT PRACTICING MEDICINE.—A person does not practice medicine, in contravention of a statute which forbids anyone, without a certificate of qualification, to prescribe for the use of another "any drug, or medicine, or other agency" for the treatment of disease, where he merely prescribes a "system of rubbing and kneading the body," commonly known as osteopathy, for the treatment, cure, and relief of a certain bodily infirmity or disease. Such a system is not an "agency" within the meaning of the statute. (State v. Liffing, 358.)

See Husband and Wife, 3.

PLEADING.

See Attachment, 9; Bonds; Contracts, 1; Judgments, 9; Mechanics' Liens, 8; Negligence, 9.

POLICE POWER.

1. POLICE POWER.—A STATE, in the exercise of its police power, may enact any law, not in plain conflict with some provision of the state or federal constitution, which is deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people. (Harbison v. Knoxville Iron Co., 682.)

2. POLICE POWER.—THE RIGHT OF CONTRACT between employer and employes is a legitimate subject for the exercise of the police power of a state. (Harbison v. Knoxville Iron Co., 682.)

3. POLICE POWER—SCOPE OF LEGISLATIVE DISCRETION.—It is for the legislature to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of this legislative discretion is not subject to review by the courts when the measures adopted are calculated to protect public health and secure public comfort, safety, or welfare, but the measures so adopted must have some relation to the ends thus specified. (Ruhstrat v. People, 30.)

4. POLICE POWER—LEGISLATIVE DISCRETION.—The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen, and its determination upon this question is not final or conclusive. (Ruhstrat v. People, 30.)

5. POLICE POWER—REGULATION OF BUSINESS.—If the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which such business may be carried on or advertised, the legislature is not the exclusive judge

as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. (*Ruhrstrat v. People*, 30.)

6. POLICE POWER—HEALTH OFFICER—LIABILITY FOR QUARANTINE.—A health officer, acting in good faith and within his statutory authority, is not liable for quarantining a dwelling-house infected with smallpox and in allowing persons sick with that disease to remain there, or in prohibiting the inmates who were not sick from leaving and others from entering. (*Whidden v. Cheever*, 154.)

7. CONSTITUTIONAL LAW—POLICE POWER.—A statute prohibiting the deposit of sawdust in the waters of a lake or any tributary thereto, thus rendering such waters unwholesome, is a proper and constitutional exercise of the police power. (*State v. Griffin*, 139.)

8. CONSTITUTIONAL LAW—POLICE POWER.—A statute enacted under the police power, regulating the use of property and affecting injuriously individual rights and interests, does not entitle the person thus affected to compensation, when no part of his property is taken. (*State v. Griffin*, 139.)

9. CONSTITUTIONAL LAW.—POLICE POWER is limited to enactments which have reference to the public health or comfort, or the safety or welfare of society, and laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment. (*Ruhrstrat v. People*, 30.)

PREScription.

See Adverse Possession.

PRESUMPTIONS.

See Appeal, 4; Assignment for Benefit of Creditors, 1; Infants, 3; Insurance, 5; Negotiable Instruments, 8; Railroads, 10; Witnesses, 6.

PRIVIES.

See Judgments, 11, 12.

PROCESS.

PROCESS—EXEMPTION FROM SERVICE OF.—The constitutional provision exempting members of Congress from arrest while it is in session, or while they are going to and returning therefrom, does not extend to service of process in a civil action nor does it exempt them from such service while absent on leave from Congress attending to private business, while it is in session. (*Worth v. Norton*, 524.)

See Attachment, 12, 13.

PROMISSORY NOTES.

See Negotiable Instruments.

PROTEST.

See Negotiable Instruments, 14, 15; Taxes, 3.

PROXIMATE CAUSE.

See Negligence, 8, 9.

PUBLIC LANDS.

PUBLIC LANDS.—THE GRANT BY CONGRESS of lands to a state "for the use of schools" is an absolute grant, and not a grant upon a condition subsequent. (*Schneider v. Hutchinson*, 474.)

See Adverse Possession, 2.

PUBLIC OFFICERS.

See Officers.

QUARANTINE.

See Police Power, 6.

RAILROADS.

1. RAILROADS—BAGGAGE—DELIVERY IN ADVANCE.—An owner of baggage has the right to deliver it at a railway station such time before the starting of a train as may be reasonably necessary for obtaining a ticket, checking the baggage, etc., but he cannot, by an earlier delivery, without the consent of the carrier, impose upon the carrier liability of an insurer. (*Goldberg v. Ahnapee etc. Ry. Co.*, 899.)

2. RAILROADS—BAGGAGE, PRESCRIBING TIME WHEN WILL BE CHECKED.—If a railway, by rule, prescribes thirty minutes before train time within which to check baggage, but it is delivered at 5 o'clock in the evening for a train which leaves at 6 o'clock the next morning, because the delivery in the morning would be inconvenient and more expensive, it cannot be said, as a matter of law, that such limit is unreasonable, or that twelve hours is reasonable, or rendered reasonably necessary by the circumstances. (*Goldberg v. Ahnapee etc. Ry. Co.*, 899.)

3. RAILROADS—CHECKING BAGGAGE—EVIDENCE AS TO—WHAT NOT PREJUDICIAL.—If baggage is delivered at a railway station at 5 o'clock in the evening for a train which leaves at 6 o'clock the next morning, but is destroyed during the night by fire, and an action is brought for its loss, the admission against objection of testimony that the delivery of the baggage in the evening was of no advantage to the company is not prejudicial to the plaintiff, where he knew that the agent was prohibited from checking baggage until half an hour before train time. (*Goldberg v. Ahnapee etc. Ry. Co.*, 899.)

4. RAILROADS—LOSS OF BAGGAGE—PLEADING.—THERE IS NO VARIANCE between the pleadings and the proof, in an action against a railroad company for the loss of baggage, where it is alleged that the company, as a common carrier, received and undertook to transport safely, and to deliver to the plaintiff, a certain box containing specified articles, and the proof shows that the plaintiff bought a ticket, and that the company received the box as a part of the plaintiff's baggage, giving him a check therefor. (*Ranchau v. Rutland R. R. Co.*, 761.)

5. RAILROADS — TICKETS — PRINTED RESTRICTIONS THEREON—FORCE OF.—The holder of a railroad passenger ticket is not bound by a restriction printed thereon, limiting the company's liability for loss of baggage, unless he had notice thereof when he bought it. He is not, therefore, bound by the restriction, where he could neither read nor write, and was not informed of it by anyone. (*Ranchau v. Rutland R. R. Co.*, 761.)

6. STREET RAILWAYS—TRANSFER TICKET.—A condition printed on the back of a transfer check issued by a street railway company, that, in case of controversy with the conductor about the ticket and its refusal, the passenger shall pay another regular fare, and apply at the office of the company for a refunding of the excessive charge within three days, is unreasonable and void, since it places the entire burden of the controversy upon the wronged passenger, and none upon the wrongdoing company. (*O'Rourke v. Citizens' St. Ry. Co.*, 639.)

7. STREET RAILWAYS—TRANSFER TICKET.—A CONDITION printed on the back of a transfer check issued by a street railway company, requiring the passenger to examine the date, time, and direction indicated by the conductor's punch marks, and see that they are correct, is unreasonable and void, because a passenger is not bound to verify the act of the conductor in issuing a transfer. (*O'Rourke v. Citizens' St. Ry. Co.*, 639.)

8. A RAILROAD TICKET IS BUT EVIDENCE of the contract of carriage between a carrier and a passenger. One who makes a valid contract is entitled to passage according to its terms, even though the ticket given him is defective in failing to express those terms, and if he is expelled from the train on account of such defective ticket, the carrier is liable for all proximate damages resulting therefrom. This rule applies to a transfer ticket issued by a conductor on a street railway. (*O'Rourke v. Citizens' St. Ry. Co.*, 639.)

9. AN ELECTRIC RAILWAY COMPANY MUST EXERCISE a high degree of care, both in the construction of its lines, and in their continued maintenance in a good and safe condition. (*Chattanooga Electric Ry. Co. v. Mingle*, 703.)

10. RAILROADS—ELECTRIC—FALL OF ELECTRIC WIRE—PRESUMPTION OF NEGLIGENCE.—Where the guy wire of an electric railway company breaks and falls to the ground in a public street, even though such fall is caused by the stroke of a trolley, there arises a presumption of negligence on the part of the railway company, which, unless rebutted, entitles one who is injured thereby to recover. (*Chattanooga Electric Ry. Co. v. Mingle*, 703.)

11. EMINENT DOMAIN—DAMAGES—RAILROADS.—Though a railroad company has legal authority to build a railroad in a street, yet, if so doing works injury to an abutting property owner, he may recover damages of the company therefor. (*Guinn v. Ohio River R. R. Co.*, 806.)

12. EMINENT DOMAIN—DAMAGES TO LOT ABUTTING RAILROAD, LIABILITY OF LESSEE.—If a railway company builds its road in a street and thus damages an abutting lot, the damage is original and permanent, and such company is at once liable therefor, but a lessee company subsequently operating the road is not liable for such damage. (*Guinn v. Ohio River R. R. Co.*, 806.)

13. EMINENT DOMAIN—DAMAGES TO LOT ABUTTING ON RAILROAD.—If a railway builds its road in a street, under li-

cense, and thereby damages an abutting lot, the measure of damage is the difference in the value of the lot immediately before and immediately after the construction of the road. (*Guinn v. Ohio River R. R. Co.*, 806.)

14. EMINENT DOMAIN—MEASURE OF DAMAGES TO ABUTTING PROPERTY.—In estimating damages to a lot and mill thereon from the construction of a railroad in front of it, the increased wholesale trade resulting therefrom may be set off against the loss of local retail trade, in fixing the value of the property. (*Guinn v. Ohio River R. R. Co.*, 806.)

15. RAILROADS—SPECIAL PRIVILEGES.—A railway company cannot confer upon one person the exclusive privilege of entering its premises to solicit the carriage of baggage and passengers therefrom to the exclusion of others engaged in the same business. (*Hedding v. Gallagher*, 204.)

RAPE.

1. RAPE—BURDEN OF PROOF—REASONABLE DOUBT.—If a defendant charged with rape admits the connection, but denies the rape, he does not set up an affirmative defense, and it is still incumbent on the prosecution to prove all the elements of the crime charged, including the issue as to consent, beyond a reasonable doubt. (*State v. Taylor*, 575.)

2. RAPE.—EVIDENCE of the reputation of the house in which the prosecutrix for rape lives with others is not competent evidence. (*State v. Taylor*, 575.)

3. RAPE—EVIDENCE—OPINION.—If, in a prosecution for rape, all of the circumstances, including the distance of the road from the spot, the nature of the time, and others, have been given to the jury, it is harmless error to refuse to allow a witness to give his opinion as to whether the prosecutrix's cry of distress could have been heard by a person passing along such road at the time. (*State v. Taylor*, 575.)

4. RAPE—EVIDENCE—REPUTATION FOR CHASTITY.—Inquiry as to the reputation of the prosecutrix in rape for chastity must relate and be confined to such character prior to the alleged crime. (*State v. Taylor*, 575.)

5. RAPE.—INSTRUCTIONS in a rape case presenting the theory of the prosecution as to the character of the force necessary under the facts proved to constitute the crime, predicated upon the testimony of the prosecutrix alone, but not referring in terms there-to are not erroneous as being on the weight of the evidence. (*Payne v. State*, 712.)

6. RAPE—SLEEPING WOMAN—FORCE.—The act of copulation by a man with a woman, she being asleep at the time and not consenting, is sufficient force to constitute rape. (*Payne v. State*, 712.)

7. RAPE—SLEEPING WOMAN—WANT OF CONSENT.—The act of copulation by a man with a sleeping woman, "without" or "against" her consent, is sufficient to constitute rape, although the force used is only such as is necessary to the mere act of copulation. (*Payne v. State*, 712.)

REAL PROPERTY.

1. REAL PROPERTY.—THE USE OF LAND by the proprietor is not an absolute right, but is qualified and limited by the higher

right of others to the lawful possession of their property. (Sullivan v. Dunham, 274.)

2. REAL PROPERTY—BLASTING ON—LIABILITY FOR.—One who for a lawful purpose and without negligence or want of skill explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway is liable for the injury thus inflicted as a trespasser. (Sullivan v. Dunham, 274.)

3. REAL PROPERTY—BLASTING ON—CONSEQUENTIAL INJURY.—Where one who is engaged in a lawful act explodes a blast upon his own land which causes injury to his neighbor, but such injury is consequential and not direct, there being no technical trespass, there is no liability in the absence of negligence. (Sullivan v. Dunham, 274.)

4. REAL PROPERTY—DAMAGES TO MERE OCCUPANT.—The rightful occupant of real property, whether the owner in fee, a life tenant, or a lessee, may recover for any injury to his possession by the wrongful act of another. (Garland v. Aurin, 699.)

5. REAL PROPERTY—INJURY TO OCCUPANT OF.—The owner of real property who wrongfully causes noxious vapors to rise on the land of another is liable therefor, the same as if such vapors had been wrongfully caused to rise from his own land. (Garland v. Aurin, 699.)

6. REAL PROPERTY—FENCES—PROOF OF OWNERSHIP.—In an action for damages to stock by coming in contact with a barbed wire fence, the ownership of the fence may be proved by parol. (Siglin v. Coos Bay Co., 463.)

RECEIVERS.

1. RECEIVERS—LEGAL TITLE.—The title to property is not changed by the appointment of a receiver. (Murtey v. Allen, 779.)

2. FOREIGN RECEIVERS—ENFORCING A LIABILITY FOR THE BENEFIT OF CREDITORS.—A foreign receiver, who seeks to enforce in this state, against a resident thereof, a liability for the benefit of creditors arising in the state of his appointment, cannot maintain an action at law in his own name for such purpose, where his declaration fails to show legal title in himself. (Murtey v. Allen, 779.)

3. FOREIGN RECEIVERS—RIGHTS OF.—In Vermont, a foreign receiver, who seeks to enforce against a resident of that state a liability arising under the laws of the state of his appointment, is confined to the remedy given him by the common law. (Murtey v. Allen, 779.)

4. FOREIGN RECEIVERS—SUIT BY.—A foreign receiver cannot maintain an action at law, in his own name, without having the legal title to the matter or thing in controversy. (Murtey v. Allen, 779.)

See Homesteads, 2.

REFORMATION.

See Equity.

RELEASE OF DAMAGES.

See Contracts, 5.

RELIEF DEPARTMENT.

See Contracts, 5.

REMAINDERS.

See Partition.

REPLEVIN.

REPLEVIN—JURISDICTION.—The provisional remedy in replevin under the statute to obtain immediate possession of the subject in controversy is not essential to the commencement or maintenance of the action, and any error in such proceeding does not affect the jurisdiction of the court to entertain such action and proceed to judgment. (*Hart v. Moulton*, 881.)

RES GESTÆ.

See Evidence, 11; Homicide, 7; Husband and Wife, 5.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgments, 10-13; Husband and Wife, 5.

RETROACTIVE LAWS.

See Statutes, 15-20.

REVENUE STAMP.

See Forgery, 3.

SALES.

1. SALES—RULE OF CAVEAT EMPTOR—EXCEPTION AS TO PROVISIONS.—Upon the sale of goods and chattels, if there is no express warranty of their quality and no fraud, the maxim caveat emptor applies, and no warranty is implied by law; and the exception in respect to provisions does not extend beyond the case of a dealer who sells them directly to the consumer for domestic use. (*Warren v. Buck*, 754.)

2. SALES.—THE MAXIM CAVEAT EMPTOR APPLIES. and a defendant is not answerable where he, being a farmer, sold to the plaintiff, a butcher, seven hogs, on inspection, at a certain price per pound, knowing that they were to be killed, cut up, and sold, in the usual course of business, as was done, and two of the hogs had tuberculosis, a latent defect rendering them unfit for food and dangerous to a consumer's health. (*Warren v. Buck*, 754.)

3. SALES—DELIVERY OF POSSESSION.—A sale of personalty in the custody of a lessee is valid as against creditors of the vendor without actual change of possession, and is not rendered void by the failure of the vendee to notify the lessee of the sale during the term of the lease. (*Corning v. Records*, 178.)

4. SALES—BREACH OF CONTRACT.—A DEALER is answerable for breach of contract when he sells a thing as being of a particular kind, if it does not answer the description, the vendee

not knowing whether the vendor's representations are true or false, but relying upon them as true. (*Hoffman v. Dixon*, 916.)

5. SALES—EXPRESS WARRANTY—FORM.—No particular form of expression or words is necessary to make an express contract of warranty, and the word "warranty" is not necessary to it. (*Hoffman v. Dixon*, 916.)

6. SALES—EXPRESS WARRANTY—WHAT CONSTITUTES. An affirmation of the fact as to the kind or quality of an article offered for sale, of which kind or quality the vendee is ignorant, but upon which affirmation he relies in purchasing the article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject. (*Hoffman v. Dixon*, 916.)

7. SALES—EXPRESS WARRANTY—RAPE SEED.—If a purchaser calls at a store for rape seed, of which he is ignorant, and wild mustard seed is sold to him as rape seed, which he accepts, to his injury, relying upon the fact that the seed sold to him is rape seed, the vendor is liable in damages for a breach of warranty, whether he knew that the seed were rape seed or not. (*Hoffman v. Dixon*, 916.)

8. SALES—FRAUD IN.—The intention of a purchaser not to pay for property may be inferred by the jury from the circumstances, and the conduct of the vendee, not only in respect to the sale in question, but in other contemporaneous transactions. (*Miller v. White*, 791.)

9. SALES—FALSE REPRESENTATIONS—RESCISSION.—If a person misrepresents to another material facts, knowing, or under such circumstances that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other without negligence, relying upon such representations, makes the sale, he can, upon discovering the truth, rescind the transaction and recover the property, saving the rights of bona fide purchasers or encumbrancers thereof in the meantime. To obtain property in the manner indicated constitutes a substantive, actionable wrong, without regard to whether the vendee does or does not intend to pay for the subject of the purchase. (*Hart v. Moulton*, 881.)

10. SALES—FRAUDULENT REPRESENTATIONS—RESCISSION.—A sale of property procured by false representations and a purchase with an existing intent on the part of the purchaser not to pay for the property are distinct, actionable wrongs. The former is complete without the existence of an intent not to pay for the property, and the latter is complete though there is no false representation to induce the sale. In case of the latter wrong false representations and undisclosed insolvency are not necessary elements, but are evidentiary facts tending to establish the intent not to pay, though the latter of itself is not sufficient to establish such fact. (*Hart v. Moulton*, 881.)

11. CARRIERS.—THE RIGHT OF STOPPAGE IN TRANSITU may be exercised at any time while the goods remain in the possession of the carrier as carrier. (*Wheeling etc. R. R. Co. v. Koontz*, 435.)

12. CARRIERS—TRANSIT DOES NOT END BEFORE DELIVERY—STOPPAGE IN TRANSITU.—A vendor of lumber may recover possession of it, by stoppage in transitu, where there has been no delivery to the consignee, and the lumber is still in transit, when it appears that it has been shipped and has arrived at its point of destination, that notice of such arrival has been given to the con-

signee, that the latter did not pay the freight nor manifest any intention of receiving the lumber, and that it remains in the custody of the carrier, without any agreement that the latter shall hold and care for it as agent of the consignee. (*Wheeling etc. R. R. Co. v. Koontz*, 435.)

13. **SALE BY CONSIGNEE TO CARRIER BEFORE DELIVERY—BONA FIDE PURCHASER.**—If a consignee, after a notice of the arrival of goods, fails to pay the freight thereon, and manifests no intention of receiving them, a sale thereof by the consignee to the carrier, in consideration of the unpaid freight thereon and other pre-existing indebtedness, consisting also of unpaid freight bills, does not constitute the carrier a bona fide purchaser. (*Wheeling etc. R. R. Co. v. Koontz*, 435.)

14. **STATUTE OF FRAUDS—PERSONALTY.**—A statute providing that no action shall be brought upon any contract for the sale of lands unless such contract, or a memorandum thereof, shall be in writing, has no application to contracts relating alone to personalty. (*Turnipseed v. Sirrine*, 580.)

SEDUCTION.

1. **SEDUCTION.—A PROMISE OF MARRIAGE** is not necessary in Tennessee in order to constitute seduction; mere solicitation and importunity is sufficient. (*Bradshaw v. Jones*, 655:)

2. **SEDUCTION.—TO CONSTITUTE** seduction, the consent of the female to the act of intercourse may be induced by any act, representation, or statement of the man, in the absence of which there would be no willingness on the part of the woman; but it is not seduction where the willingness arises out of the sexual desire or curiosity of the female, so that she only needs opportunity for the commission of the act. (*Bradshaw v. Jones*, 655.)

3. **EVIDENCE—SEDUCTION.**—In an action for seduction, statements made by the woman on the morning following the transaction are competent evidence to sustain her version of the affair, especially when denied by the defendant. (*Bradshaw v. Jones*, 655.)

SELF-DEFENSE.

See Homicide, 1, 2

SETOFF.

See Negotiable Instruments, 10.

SLAVE DEBT.

See Debtor and Creditor, 1.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO CONVEY LAND.—If an aged person, suffering from a complication of diseases, which renders him utterly helpless and causes a most offensive odor, orally agrees with a married woman, an intimate friend, that he will convey certain land to her if she will personally care for him until he recovers or dies, and the service is fully and faithfully performed, but such person dies within a few weeks without having made the conveyance, the other party to the contract is entitled to a specific performance of it by the administrator of the

deceased, where the contract is clearly proved, where there is no question of fraud or inadequacy of consideration, and particularly where the enforcement of the contract will do no injury to third persons. (*Lothrop v. Marble*, 626.)

STATE.

See Adverse Possession, 1, 2; Limitation of Actions, 7; Mandamus, 2.

STATUTE OF FRAUDS.

See Insurance, 11; Sales, 14; Specific Performance; Wills, 1.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTES—SUBJECT MATTER GERMANE TO TITLE.—A section of a statute providing for the ratifying and validating of prior proceedings for street improvements is germane to the subject matter of the statute, the title to which is "An act to incorporate the city of Portland and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith." (*Notage v. Portland*, 513.)

2. CONSTITUTIONAL LAW—ABRIDGING RIGHT TO CONTRACT.—A STATUTE requiring all employers who pay their employes in "coupons, scrip, punchouts, store orders, or other evidences of indebtedness," to redeem the same at their face value in money, if demanded by the employé or a bona fide holder, is not an unconstitutional abridgment of the right of employers to contract and does not deprive such employers of their liberty or property without due process of law, since it is general in its terms, embracing every employer or employé in like situation, and it is enforceable in the usual modes established in the administration of government. (*Harbison v. Knoxville Iron Co.*, 682.)

3. CONSTITUTIONAL LAW—VIOLATION OF LABOR CONTRACT.—A statute making it a crime for a laborer to violate a contract with a land owner after receiving supplies is constitutional. (*State v. Chapman*, 557.)

4. CONSTITUTIONAL LAW—USE OF NATIONAL FLAG FOR ADVERTISING PURPOSES.—A statute absolutely prohibiting the use of a likeness of the national flag or emblem for any commercial purposes, or as an advertising medium is unconstitutional and void as interfering with the personal liberty and privileges of the citizen. (*Ruhstrat v. People*, 30.)

5. CONSTITUTIONAL LAW—CHOICE OF OCCUPATION.—The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the constitution, is included in the right to the pursuit of happiness. (*Ruhstrat v. People*, 30.)

6. CONSTITUTIONAL LAW—"Liberty," as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but also embraces the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, and to advertise it in any legitimate way, subject only to the restraints necessary to secure the common welfare. (*Ruhstrat v. People*, 30.)

7. CONSTITUTIONAL LAW — CHOICE OF OCCUPATION AND RIGHT TO ADVERTISE—USE OF PICTURE OF NATIONAL FLAG.—The right of the citizen, guaranteed by the constitution, to pursue the lawful calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademark, unless thereby the public safety, welfare, or comfort is interfered with. (*Ruhrstrat v. People*, 30.)

8. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under a constitutional provision that special laws shall not be passed in certain enumerated cases, and that in "all other cases where a general law can be made applicable, no special law shall be passed," the legislature may determine under the latter clause whether the specified condition exists, but as to the enumerated subjects the prohibition is absolute, and the question whether a statute upon an enumerated subject is within the prohibition against the passage of a special law is for the court and not for the legislature to determine. (*Knopf v. People*, 17.)

9. CONSTITUTIONAL LAW — SPECIAL LEGISLATION.—A statute attempting to limit the aggregate amount of tax levies which may be certified to the county clerk by municipalities in counties containing a certain number of inhabitants to a certain per cent per annum violates a constitutional provision absolutely prohibiting the passage of any special law incorporating cities, towns, or villages, or changing or amending their charters. (*Knopf v. People*, 17.)

10. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under a constitutional provision absolutely prohibiting special legislation on certain enumerated subjects, a particular county or city cannot be separated or singled out of such enumeration for special legislation, on the ground that its circumstances and conditions are different from other counties or cities. (*Knopf v. People*, 17.)

11. CONSTITUTIONAL LAW—CLASSIFICATION.—The legislature may by general law classify counties and other municipalities on the basis of the population therein. (*Knopf v. People*, 17.)

12. CONSTITUTIONAL LAW—LIMITATION ON LEGISLATION.—The legislature on which an absolute limitation is imposed by the constitution cannot finally determine the question of such limitation, and when such question arises in a judicial proceeding, the court must compare the statute with the fundamental law, and if they are found to be in conflict, must enforce the limitation, without regard to the reasons operating upon the minds of the legislators when enacting the law. (*Knopf v. People*, 17.)

13. CONSTITUTIONAL LAW—EQUAL RIGHTS.—A law that confers equal rights on all citizens of the state, or subjects them to equal burdens and inflicts equal penalties on every person who violates it, is an equal law and valid, though no one can enjoy the right, be subjected to the burden, or infringe its provisions without going to or being in a particular part of the state. (*State v. Griffin*, 139.)

14. CONSTITUTIONAL LAW—STATUTE RELATIVE TO A PARTICULAR PLACE.—The legislature may, in the exercise of the police power, constitutionally pass a general law in relation to a particular place in the state. (*State v. Griffin*, 139.)

15. CONSTITUTIONAL LAW — RETROACTIVE LEGISLATION.—Unless restricted by the state constitution, the legislature may validate retrospectively a proceeding for the improvement of a street which it might have authorized in advance, and it may cure

defects in, or make immaterial, statutory requirements which it could have dispensed with in the first instance. (*Nottage v. Portland*, 513.)

16. **CONSTITUTIONAL LAW—CURATIVE ACT—INVALID PETITION.**—The legislature may, by a curative act, validate proceedings for the improvement of a street which are invalid because the petition therefor did not have the requisite number of signers, since it might have dispensed with such petition in the first instance. (*Nottage v. Portland*, 513.)

17. **CONSTITUTIONAL LAW—CURATIVE ACT—USURPING JUDICIAL AUTHORITY.**—A statute which authorizes a city to bring an action against property owners to recover assessments, notwithstanding any irregularity or defect in the assessment proceedings, is not unconstitutional as being a usurpation of judicial authority by the legislature because it may overturn decisions of the courts, but is a curative act, though it does not use the words "ratify," "confirm," or "validate." (*Nottage v. Portland*, 513.)

18. **CONSTITUTIONAL LAW—CURATIVE ACT.—THE LEGISLATURE** cannot, by a curative act, impose new duties or obligations. Hence, a statute which authorizes a city to bring an action against a property owner to recover the proportion of the cost of an improvement, and which also provides for a lien upon the premises liable for such improvement, is not unconstitutional as imposing a personal obligation upon the property owner not provided for in the charter of the city in force at the time of such improvement, since the act authorizes the recovery of a judgment against the property owner, to be enforced only against the property liable for such improvement. (*Nottage v. Portland*, 513.)

19. **STATUTES.—A CURATIVE ACT** is a retrospective law acting on past cases and existing rights, and its effect is to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. (*Meigs v. Roberts*, 322.)

20. **STATUTES—CONSTRUCTION.—A CURATIVE ACT**, designed to validate prior proceedings for street improvements, and which authorizes an action by the city against the owner of property defectively assessed, is available as a defense against an action to recover money already paid under an invalid assessment. (*Nottage v. Portland*, 513.)

21. **CONSTITUTIONAL LAW—ASSESSMENT—DUE PROCESS OF LAW—NOTICE.**—A curative statute validating assessment proceedings, which determines absolutely the amount of the tax to be raised and the lots of land among which it is to be apportioned, is not unconstitutional as depriving a party of his property without due process of law, where, at the time the assessment was made, the property owner had notice and an opportunity to be heard as to the amount to be charged against his property. (*Nottage v. Portland*, 513.)

22. **STATUTES.—A CHANGE OF JUDICIAL CONSTRUCTION** in respect to a statute should be given the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment—that is to say, its operation must be prospective, not retroactive. (*Lewis v. Symmes*, 428.)

23. **STATUTES—BONA FIDE HOLDER.**—To constitute one a bona fide holder of orders issued by an employer in payment of wages to his employé, within the meaning of a statute authorizing such holder to recover the face value of the orders from the employer, it is only necessary that he should have bought the orders.

fairly, honestly, and for a reasonable price, in good faith. (*Harblson v. Knoxville Iron Co.*, 682.)

See Conflict of Laws, 2, 3; Evidence, 1; Master and Servant, 4; Mines and Mining, 1, 2; Officers, 1; Taxes, 4; Wills, 2.

STOPPAGE IN TRANSITU.

See Sales, 11, 12.

STREET RAILWAYS.

See Railroads, 6-9.

SUICIDE.

See Insurance, 4, 5.

SURETYSHIP.

1. SURETYSHIP—CONTRIBUTION.—If a surety liable to contribution is insolvent, contribution must be in proportion to the number of solvent sureties. (*Sloan v. Gibbes*, 559.)

2. SURETYSHIP—MATERIAL ALTERATION OF CONTRACT—DISCHARGE OF SURETIES FROM LIABILITY.—If the obligee of a bond, given by sureties for the faithful performance of a building contract, pays the contractors the entire amount of the contract price, when more than twenty per cent thereof is not due, there is such a material alteration of the contract, without the consent of the sureties, as to discharge them from liability. (*Cowdery v. Hahn*, 923.)

See Corporations, 8; Executors and Administrators, 5; Officers, 8-12.

SURFACE WATERS.

See Waters and Watercourses, 1.

TAXES.

1. TAXES—ACTIONS FOR.—Unless expressly authorized by statute, no action can be maintained for the collection of taxes where there is a special and adequate method for their collection, as by distress and sale. (*Hanson County v. Gray*, 591.)

2. TAXATION—ILLEGAL LEVY.—If, under statutory provisions, taxes levied for school purposes and for school building purposes cannot be commingled, nor taxes levied for one purpose applied to the other, items for educational purposes improperly included in the tax levy for school building purposes cannot be held valid, though the whole tax levied does not equal the amount authorized to be levied for either purpose alone. (*Knopf v. People*, 17.)

3. CONSTITUTIONAL LAW—VESTED RIGHTS.—WHERE A TAX IS PAID TO A CITY UNDER PROTEST, the taxpayer has no vested right of action to recover the amount paid on the invalid assessment, where such right is based upon an informality in the assessment proceedings, since a party has no vested right in a defense or right of action based upon an informality not affecting his substantial equity. (*Nottage v. Portland*, 513.)

4. STATUTES—STATE TAX SALE—EFFECT.—A statute expressly providing that a tax deed from the state comptroller, after the lapse of the requisite time, shall be conclusive evidence that "all notices required by law to be given previous to the expiration

of the two years allowed by law to redeem were regular and regularly given," is essentially a statute of limitations and not a curative act. (*Meigs v. Roberts*, 332.)

See Injunctions, 6.

TICKETS.

See Railroads, 5, 7, 8.

TORTS.

See Infants, 1, 2.

TRANSFER TICKETS.

See Railroads, 6, 7.

TRESPASSERS.

See Mortgages, 1, 2; Negligence, 2, 3.

TRIAL.

1. TRIAL.—A JURY MUST NOT GO BEYOND THE LINE OF REASONABLE PROBABILITY. Hence, if a right to recover turns upon the question as to whether an insured person committed suicide, the court should direct a verdict for the defendant, where the evidence all points to suicide as the cause of death so as to leave no reasonable probability to the contrary; or if a verdict is rendered for the plaintiff, under such circumstances the court should set it aside and grant a new trial. (*Agan v. Metropolitan Life Ins. Co.*, 905.)

2. TRIAL—WAIVER OF RIGHT TO GO TO JURY.—When both parties move for the direction of a verdict, they impliedly consent that the court shall decide every question of fact in the case, and thereby waive the right to go to the jury. (*Second Nat. Bank v. Weston*, 283.)

3. TRIAL—WAIVER OF RIGHT TO GO TO JURY.—A plaintiff does not waive his right to go to the jury where, while he at first seemingly acquiesces in the position that there was no question of fact, upon the defendant's moving for the direction of a verdict, yet, before the court has taken any action, and after a discussion of the evidence by the trial judge, requests that the entire case be submitted to the jury and excepts to the refusal of his request. Until final action was taken by the actual direction of a verdict, the plaintiff's counsel could change his mind and ask to go to the jury. (*Second Nat. Bank v. Weston*, 283.)

4. TRIAL.—IF MOTION FOR NONSUIT based on alleged insufficiency of plaintiff's evidence is erroneously denied, and defendant introduces his evidence supplying such deficiency, a verdict for plaintiff cannot be set aside. (*Gagnon v. Dana*, 170.)

See Insane Persons, 2-4; Instructions.

TRUSTS.

1. TRUST TO LEASE LAND—PAYMENT OF MORTGAGE.—Under a statute authorizing the creation of an express trust "to sell, mortgage, or lease real property . . . for the purpose of satisfying any charge thereon," the word "lease" is restricted in its meaning to a lease of land for a given sum, and does not au-

thorize the trustee to lease in the ordinary sense of the term, and to receive the rents and profits of the land and apply them to the satisfaction of a mortgage thereon, since this would increase the capital of the trust estate in violation of a statute prohibiting the accumulation of rents and profits, except during the minority and for the benefit of minors. (*Hascall v. King*, 302.)

2. TRUSTS—PART VOID.—Where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand and the other fall. (*Hascall v. King*, 302.)

3. WILLS—TRUST FOR ACCUMULATION OF INCOME—PAYMENT OF MORTGAGES.—The application of the income of a trust estate to the payment of mortgages on such estate, which results in withholding a portion of the income from present beneficial enjoyment, to the end that the estate may be augmented in value, constitutes an accumulation within the meaning of a statute prohibiting the accumulation of the rents and profits of real estate except during the minority and for the sole benefit of minors, and is invalid even though such accumulation takes the form of the payment of indebtedness. (*Hascall v. King*, 302.)

See Charities, 6-8.

VEHICLES.

See Municipal Corporations, 1, 2.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—CONTRACT WITH MUTUAL CONDITIONS—PERFORMANCE—NECESSITY OF.—If a person agrees to convey an interest in real estate, such as a leasehold interest in oil property, upon the payment of a given sum as purchase money, the deal to be closed by a certain day, and the purchaser agrees to pay a part of the purchase money on that day, the contract contains mutual conditions, and no action can be maintained thereon by the purchaser without averring a performance, or an offer, to perform. (*Raudabaugh v. Hart*, 361.)

2. VENDOR AND PURCHASER.—SUBSEQUENT PURCHASERS with actual notice of the existence of a deed are not innocent purchasers, though such deed is not recorded. (*McGhee v. Wells*, 567.)

3. PURCHASER FOR VALUE—PRESUMPTION.—If the same property is conveyed by the same grantor to two different persons, at different times, and, after both deeds are recorded, a person takes a mortgage from the grantee in the deed last executed, but first recorded, such mortgagee must, in an action to foreclose the mortgage, and in order to establish it as against the first grantee, assume the burden of proving that the mortgagor was a bona fide purchaser for value without notice of the prior conveyance. This fact will not be presumed. (*Parrish v. Mahany*, 604.)

4. CONTRACT TO SELL PROPERTY OF OTHERS—WHEN NOT THAT OF AN AGENT.—A contract whereby a person agrees to sell property owned by himself and others, which purports on its face and by its terms to be the contract only of the individual who sells, is not a contract by the vendor to sell as an agent for the others, although the seller falsely represented to the buyer that he had full power and authority to sell the interests of such other persons. (*Raudabaugh v. Hart*, 361.)

5. VENDOR AND PURCHASER—VENDOR'S LIEN.—Ordinarily, a vendor of real estate has an equitable right to a lien thereon to secure the unpaid purchase money, and the death of the grantee does not extinguish such right of lien. (*Berger v. Berger*, 877.)

6. VENDOR AND PURCHASER—VENDOR'S LIEN—ABROGATION BY STATUTE.—The right to a vendor's lien for unpaid purchase money of land may be changed or abolished by statute. (*Berger v. Berger*, 877.)

VENDOR'S LIEN.

See Homesteads, 3; Vendor and Purchaser, 5, 6.

VERDICT.

See Appeal, 24.

VOLUNTARY CONVEYANCES.

See Equity.

WAGER.

See Gaming, 1, 2.

WAIVER.

See Judges, 3; Trial, 2, 3.

WARRANTY.

See Sales, 5-7.

WATERS AND WATERCOURSES.

1. WATERS AND WATERCOURSES—DRAINAGE OF SURFACE WATER.—The proprietor of land, whether urban or rural, has an easement for the drainage of surface water in its natural flow over the lower lands of an adjacent proprietor, and the latter proprietor is liable in damages to the former for any obstruction to the natural flow of such water. (*Garland v. Aurin*, 699.)

2. WATERS AND WATERCOURSES.—HIGH-WATER MARK on fresh-water rivers is not the highest point to which the stream rises in times of freshet, but is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. (*Dow v. Electric Co.*, 189.)

WILLS.

1. WILLS—PAROL AGREEMENT TO MAKE—STATUTE OF FRAUDS.—If two persons enter into an oral agreement to make mutual wills, and one of them, in execution thereof, bequeaths to the other, who subsequently dies without making a will, a legacy of ten thousand dollars and the residue of her estate, this is such part performance of the agreement on her part as takes the case out of the operation of the statute of frauds, permits the agreement to be proved by parol, and authorizes a decree against the heirs of the deceased, to the effect that the party who has made her will is the equitable owner, and entitled to be clothed with the legal title to all of the property which she would have received if the will of the other party to the agreement had been made. (*Turnipseed v. Sirrine*, 580.)

2. WILLS—EXECUTION—SIGNATURE.—A will, drawn on a printed blank, being one piece of paper folded so as to make a sheet of four pages, with the attestation clause printed at the top of the second page and executed at that point, so that the first two pages make a complete will, is not subscribed at the end as required by the statute, where the third page contains further dispositions of property, even though the third page has been marked "2nd page" by the draughtsman, and the second page has been marked "3rd. page." (Matter of Andrews, 294.)

3. WILLS—EXECUTION.—IN THE CONSTRUCTION OF A STATUTE regulating the execution of wills, the intention of the legislature, and not that of the testator, governs; and a will which in its execution does not conform to the provisions of the statute will be denied probate, however honest the intention of the testator may have been. (Matter of Andrews, 294.)

4. WILLS—RULES OF CONSTRUCTION.—When a testator employs language that is clear, definite, and incapable of any other meaning than that which is conveyed by the words used, there is no reason for resorting to the rules of construction invoked in the case of ambiguous wills. (Wadsworth v. Murray, 265.)

5. WILLS—CONSTRUCTION.—TRANSPPOSITION of the words of a will is only to be made when necessary to give effect to a meaning and purpose of the testator which is certain. (Rose v. Hale, 40.)

6. WILLS—CONSTRUCTION.—THE INTENT OF THE TESTATOR, if clearly disclosed by his will, must prevail, even if some words must be rejected to give effect to such intent. (Rose v. Hale, 40.)

7. WILLS—CONSTRUCTION—INTENT.—A will providing, "first," for the payment of the funeral expenses and debts of the testator, "second," a devise of all his real estate to his widow, "thirdly," certain specified personalty and all personal property not otherwise disposed of to her "whilst she remains my widow," creates only an estate for life in the widow in both the realty and personalty, as the word "thirdly" must be eliminated as a purposeless connecting word. (Rose v. Hale, 40.)

8. WILLS—INTENT TO DISINHERIT GRANDCHILD.—The supposition that a testator did not intend to disinherit the child of his only surviving daughter will not prevent the exclusion of such child, when he is an alien, since the testator could not have anticipated that his daughter, who, at the time of his death, was unmarried and a member of his household, would marry an alien, and thus bring into the settlement of the estate the question of alien issue. (Wadsworth v. Murray, 265.)

9. WILLS—CONSTRUCTION—SHIFTING EXECUTORY BEQUEST.—If a testator gives to each of his three daughters one hundred and fifty dollars in certain personal property, in case the legatee marries within eight years from the date of the will, and, if not married within that time, five hundred dollars in cash at the end of the eight years, with a proviso that if either daughter shall die leaving no heirs, her legacy shall be divided among the survivors, such proviso creates a conditional limitation in the sense of a shifting executory bequest, and the time referred to therein by the testator is the time when the legacies become due or payable. Hence, if a daughter dies, without children, before the expiration of the eight years, her estate is cut short and shifted to the survivors; but if all live beyond that period, each takes her share absolutely, and upon her subsequent death, without children, it being agreed that the

word "heirs" in the will shall be construed as "children," her share will pass by descent and not to her surviving sisters. (*Andrews v. Sargent*, 769.)

10. **WILLS.—THE WORDS "LAWFUL ISSUE,"** when used in a domestic will, primarily and generally mean descendants; and where there is nothing to the contrary to be found in the context of the instrument, or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used in a will. (*New York Life etc. Co. v. Viele*, 238.)

11. **WILLS—MEANING OF "LAWFUL ISSUE"—WHETHER INCLUDE CHILD ADOPTED IN FOREIGN COUNTRY.**—Where the clear intent of a testatrix, in devising a remainder to the "lawful issue" of her daughter, is to transmit the whole estate to her own descendants, and not to adopted children, although at the time of making the will she knew that her daughter, who lived in a foreign country, had legally adopted a child, such intention controls in the interpretation of the will, and the status of the adopted child under the laws of the country of its adoption is immaterial, even though under such laws the adopted child is considered the lawful issue of the testatrix's daughter. (*New York Life etc. Co. v. Viele*, 238.)

12. **WILLS—LAW OF DOMICILE.—IN THE INTERPRETATION** of wills the law of the domicile must prevail. (*New York Life etc. Co. v. Viele*, 238.)

13. **WILLS—DOMICILE OF TESTATRIX.**—Where a testatrix at the time of the execution of her will was residing in a foreign country, a finding by the trial court that she never changed, nor intended to change, her domicile, but when she made the will, and up to the time of her death, her legal domicile was in New York, is conclusive on appeal, and her will is, therefore, a domestic and not a foreign will. (*New York Life etc. Co. v. Viele*, 238.)

14. **WILLS—WHEN HEIR NOT EXCLUDED.**—The fact that a testator by his will leaves property in trust for the benefit of one during life, and if such a one dies without issue the absolute estate to descend as if the will had never been made, does not show an intent in the testator to cut off such a one from receiving any portion of his estate, and will not prevent him from taking, as heir of the testator's daughter, a share of her interest in the remainder which the will vested in her. (*Wadsworth v. Murray*, 265.)

15. **WILLS—HEIRS—TIME WHEN ASCERTAINED.**—Where a testator leaves property in trust to one for life, and if he dies without leaving issue, the entire and absolute estate to descend to, and vest in, the testator's heirs at law in the same manner that it would have descended to and vested in them if the will had not been made, the heirs are to be ascertained as of the date of the testator's death. (*Wadsworth v. Murray*, 265.)

16. **WILLS—EQUITABLE CONVERSION—DOCTRINE OF, APPLIES, WHEN.**—If there is a positive direction in a will to convert the real property into personalty, or there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or if the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect. (*Harrington v. Pier*, 924.)

17. WILLS—EQUITABLE CONVERSION—ILLUSTRATION.—If a will requires the executrix to convert the real property of the testatrix into money and to distribute the entire estate as personal property in the manner indicated therein, the doctrine of equitable conversion applies, irrespective of the validity of a bequest in the will to promote the cause of temperance, where the entire scheme of the will shows that the testatrix intended to dispose of all her property thereby, and that it should be dealt with solely in the form of money; where the condition of the estate shows that the blending of real and personal property was contemplated for every purpose mentioned in the will, including a final division of the net proceeds, and where the direction to convert the entire estate into money was not merely in aid of, or merely to accomplish, a particular purpose named, but was for all the purposes of the testatrix's scheme, no one of which can be carried out according to the manifest intent unless the conversion directed takes place. (*Harrington v. Pier*, 924.)

18. WILLS—PROCEEDS OF SALE OF LAND, WHETHER PERSONALTY OR REALTY.—Where real property is devised in trust, and the trustees are authorized to sell the same and reinvest the proceeds, the fact that the will provides that the trustees shall hold the proceeds, and that they shall be disposed of in the same manner as if the real estate had not been sold, does not impress such proceeds with the character of real estate for the purpose of determining the effect of a will of the testator's son, since such provision in the testator's will merely shows the intention that the sales should not vary the ultimate disposition which the will had made of the corpus of the trust. (*Wadsworth v. Murray*, 265.)

19. WILLS—REPUBLICATION OF REVOKED WILL.—Under a statute which provides that the revocation of a second will does not revive the first, unless the testator, after the destruction of the second will, shall duly republish the first, such republication must be made with the same formalities as are required in the original publication of a will. Hence a will which has been revoked by a subsequent one which is destroyed by the testator, is not revived by his declaration that he desires his first will to stand, made to others than the subscribing witnesses, and where the persons to whom such declaration is made do not subscribe as witnesses to the will. (*Matter of Stickney*, 246.)

WITNESSES.

1. WITNESSES—PERSONAL KNOWLEDGE.—IT IS PRESUMED that the answer of a witness is based upon his personal knowledge. (*Ranchau v. Rutland R. R. Co.*, 761.)

2. EVIDENCE—TRANSACTIONS WITH DECEDENT.—A witness may testify to a transaction or communication between a deceased person and another who is a party to the case, although the witness might, in a certain event, also become a party to the cause on trial. (*Sloan v. Hunter*, 551.)

3. WITNESSES — CROSS-EXAMINATION — ATTACKING CREDIBILITY.—Where an insurance company, through its agents, takes the position that a policy has lapsed before the loss occurred, the insured may, for the purpose of attacking the credibility of the insurance agents, ask them on cross-examination whether they had not stated to third parties after the fire that they thought the loss would be paid and that the insured would not lose the amount,

and, in case of their denial, the insured may show that they had made such statements. (*Squier v. Hanover Ins. Co.*, 349.)

4. **WITNESSES — CROSS-EXAMINATION — CONSIDERATION FOR ASSIGNMENT.**—Upon the examination of a claimant in trustee process, where the plaintiff contends that the defendant assigned to the claimant money due him in fraud of creditors, and that the assignment was, therefore, invalid as to attaching creditors by trustee process, it is proper for the plaintiff to cross-examine the claimant concerning the consideration upon which the assignment was made. (*Dow v. Taylor*, 775.)

5. **WITNESSES—EVIDENCE.**—The condition of a witness' health may be shown to explain his demeanor while on the witness stand. (*McGhee v. Wells*, 567.)

6. **WITNESSES—PRESUMPTION.**—There is no presumption that a witness, while testifying, is telling the truth. (*State v. Taylor*, 575.)

7. **WITNESSES—OPINION AS EVIDENCE.**—A witness is competent to give his opinion as to the tone of voice in which he has heard a person speak. (*State v. Taylor*, 575.)

8. **WITNESSES—OPINIONS AS EVIDENCE.**—A witness who has acquired no special knowledge on the subject is not competent to testify to the value of shade and ornamental trees to a parcel of land. (*Elvins v. Delaware etc. Tel. Co.*, 217.)

9. **WITNESSES.—OPINION EVIDENCE IS ADMISSIBLE** to prove an evidentiary fact which is not a subject of common knowledge, or one of which the jury can judge as well as the witness, and which tends to prove a probative fact involved in the issue. (*Ohio etc. Torpedo Co. v. Fishburn*, 437.)

10. **WITNESSES—OPINION OF EXPERT IN SHOOTING OIL-WELLS—ADMISSIBILITY OF.**—In an action to recover damages for personal injuries alleged to have been caused by the negligent discharge of a nitroglycerin torpedo in an oil-well, it is competent for an expert witness, familiar with the business of "shooting" oil-wells, having knowledge that such explosions force gas out of a well, and knowing the danger incident to the gas coming into contact with the atmosphere and with fire, particularly where the condition of the atmosphere is such that, when the gas is liberated, it settles to the surface of the earth, to testify whether or not the hour of 7:30 o'clock P. M., on the seventh day of September, in any year, would be a proper time to explode such a torpedo in a well located in a village of twelve to thirteen hundred people, and within eighty to two hundred feet of houses in which lights or fires are burning. (*Ohio etc. Torpedo Co. v. Fishburn*, 437.)

See Appeal, 23; Evidence.

WRONGFUL DEATH.

See Negligence, 1.



Library Use Only

Library Use Only

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 190 732 6

